United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANTS AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,736 **221**

CLAUDE G. WALKER, ET AL.,

Appellants,

v.

EMMETT C. WADE,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOHN D. FAUNTLEROY
2001 Eleventh Street, N. W.
Washington, D. C.

Attorney for Appellants

STATEMENT OF QUESTIONS PRESENTED

(1) Whether, under the facts of this case, the appellee contractor had on either February 17, 1964 or on March 9, 1964 performed the work called for under his contract with the appellants substantially and in a workmanlike manner so as to entitle him to final payment.

(2) Whether one who contracts for alterations and repairs of a building owned by him, expresses his acceptance and approval of the work of the contractor by affixing his signature to a request by the contractor for final payment under the contract.

(3) Whether an architect's certificate is conclusive evidence that the work called for under a contract for alterations and repairs has been substantially performed and accepted so as to entitle the contractor to final payment under the contract.

(4) Whether the extra work alleged to have been performed by the appellee was performed (a) at the request and approval of the appellants and (b) has a reasonable value of $4,913.03.

(5) Whether in a case where a contractor seeks final payment of a contract on the grounds that it has been performed according to plans and specifications, the owner should be given credit for the cost of a performance which the contractor was required to furnish but failed to furnish.

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* **Cases chiefly relied upon are marked by asterisks.**

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CLAUDE G. WALKER, ET AL.,

Appellants,

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Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the United States District Court for the District of Columbia (Honorable Howard F. Corcoran) entered on July 13, 1965 as amended by order dated July 23, 1965 in Civil Action No. 1175-64. Notice of this appeal was filed on August 20, 1965. This Court has jurisdiction of the appeal pursuant to Title 28, Section 1291, United States Code.

STATEMENT OF THE CASE

On August 12, 1963, the appellants Claude G. Walker and Maude Josephine Walker, entered into a written agreement with the appellee, Emmett C. Wade for the alteration and repair of a building located at 3103 Georgia Avenue, Northwest, Washington, D. C. The work was to be done in accordance with certain plans and specifications prepared by one L. W. Giles. The contract provided that the price would be $49,995.00 (J.A. 104). The contract also provided that final payment would be payable upon completion of the job according to plans and specifications. (J.A. 104) Article 5 of the agreement provided that:

> Acceptance and final payment shall be due 5 days after "substantial completion" of the work provided the work be then fully completed and the contract fully performed . . . when the Architect finds work acceptable under the contract and the contract fully performed he shall . . . issue a final certificate (over his signature) stating that the work has been completed and is accepted by him under terms and conditions thereof and that entire balance found to be due contractor . . . . (J.A. 105)

Article 6 of the agreement provided that the general conditions of the contract, supplementary general conditions and specifications and drawings together with the agreement form the contract and are as fully a part of the contract as if attached to the agreement or repeated in it. (J.A. 106)

In the General Conditions the procedure was outlined for authorizing changes in work. It provided as follows:

> Owner may order extra work or make changes. No extra work or change shall be made unless in pursuance of written order from the Owner signed or countersigned by the Architect or a written order from the Architect stating that the Owner has

> authorized extra work or change, and no claim for an addition to the contract sum shall be valid unless so ordered. (J.A. 100)

The contractor was required to keep a correct account of costs together with vouchers to substantiate any extra work claimed by him, (J.A.) and the General Conditions further provided that the contractor should give written notice of claims for extra costs within a reasonable time after receipt of instructions and that in any event, such notice was to be given before proceeding to execute the work, no claim being valid unless so made. (J.A. 100)

The appellee performed certain work pursuant to the written contract and was paid a total of $37,496.25 on account of the contract price. Subsequently, the appellant Claude G. Walker affixed his signature to a request for final payment submitted by the contractor but directed his disbursing agent not to make final payment under the contract. The reason given was that the work called for in the contract had not been performed in a workmanlike manner. Appellants also refused to pay for extra work which appellee said he had done on the premises. This refusal was based on the ground that the work had not been authorized by the appellants.

On March 9, 1964 appellee filed a notice of intention to hold a mechanics' lien, and on May 19, 1964 appellee filed a complaint against the appellants in the United States District Court for the District of Columbia to enforce a Mechanic's Lien. (J.A. 1) Appellee prayed for a judgment of $17,761.78 with interest from March 9, 1964, said amount being comprised of $5,263.03 claimed for extra work, and $12,498.75 claimed as the balance due under the written agreement. The appellants counterclaimed for $3,000.00 which they claimed to be the approximate amount they would have to expend on the building as a result of appellee's failure to perform his work in a workmanlike manner. (J.A. 4)

The case was heard without a jury and at the close of the evidence, the trial court orally ruled that the defendants had not carried the burden of proof to prevail on their counterclaim while the plaintiff had established grounds for attachment of a lien and the burden was on the defendants to show that it should not attach. (J.A. 96) As to the basic claim for $12,498.75, this was allowed (J.A. 96) and in relation to the claim for extras, the court found the claim to be established with the exception of two items totaling $350.00. (J.A. 97)

The court's finding of fact included the following: that the work was completed on or about February 17, 1964 to entitle appellee to final payment under the contract; that the appellants indicated their approval of final payment by affixing their signature to the statement rendered by appellee; that extra work performed by the appellee was done at the request of the appellants; that the work called for by contract had been performed in a workmanlike manner; that the reasonable value of the extra work was $4,913.03 and that the appellants offered no proof in support of their counterclaim.

On July 13, 1965 the trial court ordered appellee to recover from appellants the sum of $17,411.78 with interest from March 9, 1964 (J.A. 12) and on July 23, 1965 said order was amended to give appellants twenty-one days from the date of said order to satisfy the judgment and interest. (J.A. 12) This appeal followed.

RULE INVOLVED

Rule 52(a) Federal Rules of Civil Procedure

Findings by the Court

> a. Effect. In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.... Findings of fact shall not be set aside unless clearly

> erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . ."

STATEMENT OF POINTS

1. The findings and the judgment of the Court are contrary to the facts and the law.

2. The Court erred in not allowing appellants credit for the cost of a performance bond, which the appellee was required by contract to furnish, but failed to furnish.

3. The Court erred in finding that the work called for by the contract was completed on or about February 17, 1964.

4. The Court erred in finding that the reasonable value of the appellee's claim for extra services was in the sum of $4,913.03.

5. The Court erred in finding that the work called for in the contract was performed in a workmanlike manner.

SUMMARY OF ARGUMENT

The order of the District Court that the appellant pay the appellee the sum of $17,411.78 with interest from March 9, 1964 should not stand for the following reasons:

1. Substantial performance of the contract in a workmanlike manner and acceptance by the architect was a condition precedent to final payment, and under the facts of this case, substantial performance and acceptance of the work was not established even though the owner signed a request for final payment and the bank's architect issued a final certificate.

2. A contractor who seeks payment for extra work must show that the work was authorized and that the amount he is seeking represents the reasonable value of the services and materials for which payment

is claimed. Where this is not established, recovery should not be allowed.

3. Where a contractor is required by contract to furnish a performance bond and fails to do so, the court should substitute what the bond would have cost for the bond and deduct this amount from the sum which the contractor would otherwise be entitled to under the contract. In failing to make such a deduction, the Court committed error.

ARGUMENT

I.

The Court Below Erred in Finding That the Work Called for Was Completed on or About February 17, 1964 To Entitle Appellee to Final Payment Under the Contract and That the Work Had Been Accepted by the Appellants.

Substantial performance, with reference to a building contract, implies something less than a strict and literal compliance with the contract provisions, but fundamentally it means that the deviation is unintentional and so minor or trivial as not substantially to defeat the object which the parties intend to accomplish. *Wells Benz, Inc. v. United States*, 333 F.2d 89 (1964). There is substantial performance of a contract to construct buildings where builder has in good faith intended to perform his part of the contract and has done so in the sense that the building is substantially what is provided for and there are no omissions or deviations from the general plan which cannot be remedied without difficulty. *Kizziar v. Dollar*, 268 F.2d 914 (U.S. Ct. App. 10th Circuit 1959).

In the instant case, the evidence established that there were deviations from the contract provisions, and it is submitted that said deviations were neither minor nor trivial, but were of a nature which could be remedied only with difficulty, and were in existence at the time that

final payment under the contract was requested by the appellee. For example, Mr. Archer, the architect testified that "he recalled telling Wade some things he would have to do such as some painting and tile work." (J.A. 58) He further testified that both parties agreed that there was some work still to be done to fulfill the contract. (J.A. 58) Appellant Claude G. Walker testified that he observed the following conditions which existed on February 18, 1964: absence of tile at entrance including stairwell and on floor, unfinished wall to left of stairwell in basement; unlevel basement floor, irregularity of tile on floors throughout the building, powder marks on left rear wall in basement, doors improperly hung, incomplete ceiling in utility room, sinks not according to specifications, incomplete wall paneling, insufficient paint on walls and doors and several like conditions. (J.A. 62-67). Then Mr. Giles, the architect who prepared the plans and specifications testified that an inspection by him on March 1964 revealed that the sill under the front door had been improperly installed, that there was an excessive undercut under doors to waiting rooms, a hole in wall under service equipment in basement, doors throughout improperly installed, incomplete tile work, an unrepaired leak in old roof, steel beams and lintels unpainted, utility sink out of order, incomplete adjustment of window caulking and an unlevel floor in the basement. (J.A. 91, 92) Mr. Giles further testified that a later inspection on June 14, 1964 led him to believe that the deficiencies had not been corrected since his March 1964 inspection. (J.A. 95)

Although it might be argued that the appellant was not competent to determine what deficiencies existed, surely the testimony of Mr. Giles as to deficiencies observed by him should be given considerable weight since the latter is an experienced architect and also one who prepared the plans and specifications for the repair and alteration of the building in question. Both Mr. Archer and Mr. Giles testified as to the existence of deficiencies and they were clearly enumerated by

Mr. Giles. His testimony in this regard was not contradicted by the appellee.

Since there were omissions or deviations from the general plan the lower court should have taken this into consideration and should have made reasonable deductions from the contract price on account of said omissions or defects. 3 Williston, Contracts, Sec. 842 (Revised Ed. 1936); Restatement, Contracts, Sec. 275; 9 Am. Jur. Building and Construction Contracts, Sec. 42, Vol. 40, Words and Phrases, Substantial Performance.

The Court below found that Mr. Walker's approval of final payment was indicated by his affixing his signature to the statement rendered by the appellee, which statement was a request for final payment. This signature may be some indication of approval, but the signature by itself does not establish that the work was considered by the owner to have been substantially performed in an acceptable manner on February 18, 1964. This determination was to be made by the architect. (J.A. 105) The evidence shows that a final certificate was not issued by the owner's architect and although there are many instances in which the issuance of such a certificate might prove that the contract was fully performed in an acceptable manner, such weight should not be given to Mr. Archer's final certificate. That such weight need not be given is made clear by the Court of Appeals of the 5th Circuit in the case of *Franklinville Realty Co. v. Arnold Construction Company*, 120 F.2d 144 (1941). There the contention was made that the architect's certificates were final and conclusive as to the amount of work done and materials furnished. On this point the case was reversed for the reason that there was no specific provision in the contract that the certificates were to be final other than in matters relating to artistic effect, and in the absence of such a provision, the court was of the opinion that the certificates are merely "prima facie evidence" of their contents.

In the instant case, Mr. Archer, the bank's architect admitted that the contract was not fully performed when the final certificate was issued. (J.A. 58) He stated that he made an inspection prior to his issuance of the certificate, but was unable to recall the date of the inspection or what he had noted as a result of the inspection. There is some indication that the inspection, if made, was made after the final certificate had been issued. (J.A. 60) In view of the uncertainty surrounding the testimony of this witness, it is submitted that the final certificate issued by him was not entitled to the weight given it by the Trial Court in arriving at the conclusion that the contract has been substantially performed and in an acceptable manner on February 18, 1964. Moreover, the architect was an agent of the Industrial Bank rather than an agent of the owner of the building and consequently his concern primarily would not be in protecting the interest of the owner and making sure that the contract was fully performed but rather in making sure that the investment of the bank was protected. This being so, acceptance by Mr. Archer should not be considered as acceptance by the owner.

II.

The Court Below Erred in Finding That Extra Work Was Performed at the Request and Approval of the Appellants and That the Reasonable Value of the Services Was $4,913.03.

The written agreement between the parties required that changes be in writing. (J.A. 100) Here there was no evidence that any written order was ever received from the owner or from the architect of the owner. And while the appellant in this testimony acknowledged responsibility for certain items claimed in the appellee's request for extras, there were other items which he denied having authorized. Among these is the $800.00 claimed as extra cost of glass over the original price given by Hires Turner, the $500.00 cost of electrical fixtures

over the $500.00 allowance, electric contactors and relays for six heat boosters at a cost of $156.00, plumbing for two dental operatories and a dental lab at $600.00 and electric lines for two dental units, x-ray lab, and autoclave at $75.00.

In reference to the $800.00 claimed for glass paneling, a letter from Hires Turner to the appellant (J.A. 108) indicates that this expense arose as a result of the appellee failing to meet certain conditions set forth in an earlier notice to him from the glass company. It is indicated that if said condition had been met, the glass called for in the specifications could have been obtained and the $800.00 expense would have been unnecessary. Since this expense arose as a result of the appellee's lack of diligence in handling this matter, the appellant should not be made to pay for appellee's inefficiency.

As to the remaining items listed in the request for payment for extras, the court erred in requiring the appellant to pay the amounts claimed by the appellee where no evidence was introduced to support or substantiate these claims and where the request itself was admitted into evidence for the sole purpose of establishing that the request had been made. This request was insufficient evidence to sustain the trial court's finding that the reasonable value of the contractor's services was equal to the amounts contained in the request. It is submitted that the evidence and reasonable inferences fairly to be drawn therefrom are insufficient to support the Trial Court's finding. See *Sunderlich Contracting Company v. United States*, 240 F.2d 201 (CA Utah 1957), and *Fanderlick-Lock Co. v. United States*, 285 F.2d 939 (1960). In the latter case it was made clear that "where at the request of the prime contractor, labor and material is furnished by a subcontractor which is in addition to that required in the subcontract, there is an implied promise to pay a reasonable value therefor, and such payment was required. However, in the instant case the work referred to was not shown to have been done at the request of appellant and consequent-

ly, there should arise no implied promise to pay for the same. On the basis of the evidence, the Trial Court should have allowed the appellee only such amount as was proven to be the reasonable value of the extra work authorized by appellant. In allowing more, the court committed error.

The written contract in this case also required the contractor to submit written notice of claims for extra costs within a reasonable time after receipt of instructions and further provided that in any event such notice was to be given before the contractor proceeded to execute the work, otherwise the claim would not be valid. (J.A. 100) The contract was prepared by the appellee (J.A. 90) and yet he failed to comply with this provision and according to the evidence, he gave no notice of his claim until February 20, 1964 which is after the alleged completion of the extra work. On the basis of the contract provision, quoted above, only those extras which were established as having been authorized by appellants, should be recognized.

III.

The Lower Court Erred in Failing To Give the Appellant Credit for Cost of a Performance Bond Required Under the Contract.

Where a defendant commits a breach of a contract to pay a definite sum of money, or to render performance the value of which in money is stated in the contract or is ascertainable by mathematical calculation from a standard fixed in the contract or from established market prices of the subject matter, interest is allowed on the amount of the debt or money value from the time performance was due, after making all the deductions to which the defendant might be entitled. (Emphasis added) *United States v. Bethlehem Steel Corporation*, 113 F.2d 301 (CCA Pa. 1940). The contract entered into by the appellants and appellee specifically provided that the contractor "shall furnish a

satisfactory performance bond guaranteeing completion of the work." (J.A. 102) Mr. Giles upon being questioned concerning the bond stated that "a satisfactory performance bond guaranteeing completion of the work was to be included in the contract price." (J.A. 94) Appellee testified that the cost of such a bond was 5% of the contract price. (J.A. 34) Since the bond was required by the contract, but was not furnished and the amount can be reached by mathemathical calculation, which amount approximates $2,500.00, the Lower Court should have given the appellants credit for the cost of said bond and deducted $2,500.00 from the contract price. In failing to do so, the Court committed error.

In the instant case, the contractor failed to comply with the specifications which required the furnishing of a performance bond. The owner should therefore be allowed to deduct the entire cost of complying with the specification, the cost being equivalent to the prevailing market value of the thing omitted. *Turner v. Henning*, 262 Fed. 637 (1920). This is a decision of this Court of Appeals and in the case cited the court made the following observation:

> "The rule adopted by the trial court substituted what the things omitted would have cost for the things themselves, and deducted the amount from the sum to which the appellant (contractor) would otherwise be entitled under his contract. This is in accord with the decisions...as well as with sound reason."

CONCLUSION

It is respectfully urged that the Judgment of the Court below, requiring appellants to pay the appellee the sum of $17,411.78 with interest from March 9, 1964, should be reversed.

Respectfully submitted,

JOHN D. FAUNTLEROY

2001 Eleventh Street, N. W.
Washington, D. C.

Attorney for Appellants.

JOINT APPENDIX

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Exhibits:

[Filed May 19, 1964]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMMETT C. WADE
1914 Newton Street, N. E.,
Washington, D. C.
Plaintiff

vs.

CLAUDE G. WALKER
and
MAUDE JOSEPHINE WALKER
3103 Georgia Avenue, N. W.,
Washington, D. C.
Defendants

Civil Action No. 1175-'64

COMPLAINT TO ENFORCE MECHANIC'S LIEN

1. Jurisdiction of this action is based upon Title 38, Chapter 1, Section 01 et seq. of the District of Columbia Code (1961 Edition) and the parties hereto are citizens of the United States of America residing in the District of Columbia.

2. Plaintiff entered into a written contract with defendants on the 12th day of August 1963, whereby plaintiff agreed to furnish and supply defendants with certain materials and labor, in accordance with plans and specifications drawn up and set forth by defendants' architect, copies of such plans and specifications being annexed hereto as Exhibits A and B respectively, for the purpose of altering, repairing and/or renovating certain premises (a building) owned by the defendants and designated by the Land Records of the District of Columbia as Lot 110 in Square 3047, and further known as 3103 Georgia Avenue, N. W., Washington, D. C., the agreed upon consideration to be paid to plaintiff there-

for being a sum in the amount of $49,995.00, same to be paid to plaintiff in four (4) equal installments in accordance with the progress of the work as set forth in the aforesaid contract.

3. That more specifically, the aforesaid altering, repairing and/or renovating of defendants' said premises by plaintiff consisted of demolition, excavating, plumbing, installation and/or repairs of electrical fixtures, heating, air conditioning, ventilating, carpentry, masonry, plastering, painting, tiling and roofing.

4. That in addition to the foregoing and aside from the terms of the said written contract and the said plans and specifications, defendant Claude G. Walker, from time to time as the work was progressing, requested of plaintiff and orally contracted with plaintiff to add, deviate from, or alter, certain aspects of the work as originally set forth in the said written contract and plans and specifications which additions, deviations and alterations caused plaintiff to incur additional costs and expenses by way of extra labor, money and materials to the extent of $5,263.03.

5. That notwithstanding plaintiff's performance pursuant to the terms of the said written contract and plans and specifications, defendants have failed and refused, and yet refuse, to pay over to, or cause to be paid over to plaintiff, a balance of $12,498.75 due plaintiff pursuant to the terms of the said written contract.

6. That notwithstanding plaintiff's performance pursuant to the oral contract between defendant Claude G. Walker and plaintiff for the extra labor and materials furnished but not previously included in the said written contract and plans and specifications, defendants have also failed and refused and yet refuse to pay over to, or cause to be paid over to plaintiff the aforesaid additional sum of $5,263.03 due plaintiff pursuant to the said oral contract.

7. That plaintiff has completed performance pursuant to the

terms of all agreements both written and oral between himself and the defendant and/or defendants herein and in accordance with all plans and specifications, and consequently is due a total balance of $17,761.78 therefor.

8. That said sum being due and unpaid, plaintiff on March 9, 1964, caused to be filed with the Clerk of this Court a notice of intention to hold a mechanics lien upon said land and the building thereon, which notice is numbered 78-64, a copy of which is annexed hereto as Exhibit C.

9. Plaintiff on March 10, 1964, caused to have served on defendants personally, a copy of said notice, receipt of which defendants acknowledged through their agent by the said agent affixing his signature, upon receipt thereof, on a United States Post Office Certified Mail receipt, which receipt is attached hereto as Exhibit D.

WHEREFORE, plaintiff demands judgment (1) establishing plaintiff's lien on said property to the extent of his claim of $17,761.78, with interest thereon from March 9, 1964; (2) that defendants be required to pay to plaintiff the amount of said claim; (3) that in default thereof, said land and premises be sold to enforce said lien, and the proceeds of the sale be applied to satisfy said lien; (4) that a trustee or trustees be appointed for the purpose of such sale; (5) that defendants be required to pay all costs and counsel fees incurred by plaintiff herein; (6) and for such other and further relief as may seem just and proper.

/s/ ROBERT H. COOKE
Attorney for Plaintiff

[Filed June 16, 1964]

ANSWER TO COMPLAINT

Comes now the defendants and for answer to the complaint filed here say:

FIRST DEFENSE

That the complaint fails to state a cause of action against these defendants for which relief can be granted.

SECOND DEFENSE

1. That they admit the allegations contained in paragraph 1, 2, 3, and 9.

2. That they deny the allegations contained in paragraph 4, 6 and 7.

3. That they deny the allegations contained in paragraph 5 of the complaint, and by way of further answer say that the plaintiff failed to perform his work according to the terms of the contract.

4. That they admit the filing of a mechanics lien as alleged in paragraph 8, but they deny that the defendants are indebted to the plaintiff for the amount claimed.

WHEREFORE having fully answered said complaint, defendants move that it be dismissed with cost.

COUNTER CLAIM

These defendants now counterclaim against the plaintiff and say:

1. That they adopt by reference paragraphs 1, 2, and 3 of the complaint.

2. That the plaintiff failed to perform according to the terms of the contract in that much of the work performed on the building is of poor and inferior workmanship, some of which will ne-

cessitate the defendants spending approximately $3,000.00 to correct same.

3. That the defendant, Claude G. Walker, is a physician whose office is located at the building in question, and the plaintiff well knowing that time was of the essence failed to complete the contract in eighty (80) working days, causing this defendant to be damaged to the sum of approximately $2,000.00.

WHEREFORE DEFENDANTS demand judgment against the plaintiff in the sum of $5,000.00

JOHN D. FAUNTLEROY
Attorney for Defendant

[Certificate of Servce, dated June 15, 1964.]

[Filed January 8, 1965]

PRE-TRIAL PROCEEDINGS

January 4, 1965

Complaint to enforce mechanic's lien for money due under construction contract; counterclaim for damages for breach of contract.

UNDISPUTED FACTS:

Under date of August 12, 1963, Plaintiff entered into a written contract with defendant for alterations and repairs to premises 3103 Georgia Ave., N.W., Washington, D. C., owned by defendants, in accordance with certain plans and specifications prepared by L. W. Giles.

Plaintiff performed certain work pursuant to said contract and was paid sums totalling $37,496.25, on account of the contract price of $49,995.00.

On March 9, 1964, Plaintiff filed a notice of intention to hold

a mechanic's lien (No. 78-64) for the sum of $17,761.78, which was duly served on defendant.

PLAINTIFF asserts that he completed the work called for by the contract of August 12, 1963, with deviations requested by defendants, and in addition he performed certain extras requested by defendant Claude G. Walker, who was at all times present at the site of the work while it was in progress; that by reason of said deviations from the contract plan and extras requested by Defendant Claude G. Walker, Plaintiff incurred additional costs and expenses for labor and materials totalling $5,263.03, as itemized in Plaintiff's Exhibit A attached hereto; that said deviations and extras were authorized by defendant Claude G. Walker upon his being advised on each occasion that extra expense was involved and he agreed to pay therefor.

Plaintiff asserts that there is due him on account of the contract price and extras the sum of $17,761.78, representing the following:

Contract Price	$49,995.00
Extras	5,263.03
	55,058.03
Payments on account	37,496.25
Unpaid balance	$17,761.78

Plaintiff asks judgment against defendants for the sum of $17,761.78, with interest from February 17, 1964 (the date said contract was completed), counsel fees, and costs, and judgment for enforcement of its mechanic's lien in said amount.

DEFENDANTS admit authorizing extras (No. 9 and 14 on Plaintiff's list) but deny that they are liable to Plaintiff in any

amount as more fully set forth with respect to their counterclaim, and deny that Plaintiff is entitled to any of the relief prayed.

COUNTER-CLAIM:

Defendants assert that Plaintiff's performance on the building was of poor and inferior workmanship, some of which will necessitate Defendants' spending approximately $21,253.06, as more fully set forth in Defendants' Exhibit A attached hereto and made a part hereof.

Defendants further assert that Defendant Claude G. Walker, a physician whose office is located in the building in question, sustained damages through loss of earnings in the amount of $2,000.00 by reason of Plaintiff's failure to complete the contract within 80 days from the time of commencing work as required by Article 2 of the contract. Defendants contend that the work should have been completed by November 23, 1963, but was not completed until some time in March of 1964.

Defendants (in their complaint) ask judgment against Plaintiff in the sum of $5,000.

NOTE: At pretrial, counsel for Defendants asked to amend his ad damnum to increase it to $21,253.06. Counsel for plaintiff did not consent.

ANSWER TO COUNTER-CLAIM:

Plaintiff denies any breach of contract and denies that Defendants are entitled to recover damages against him in any amount.

Defendant denies all allegations of breach of contract, and asserts that the work performed by him fully complied with the contract with the changes and extras authorized by Defendant Claude G. Walker.

Plaintiff asserts that he completed work under the contract on or about February 17, 1964, and that his work was delayed by

reason of Defendants failure to obtain financing until some time in October or November, 1963, Plaintiff being delayed in performance of work under the contract by reason of Defendants failure to make payments as provided by Article 3 of the contract.

Plaintiff denies that Defendant Claude G. Walker sustained any loss of earnings by reason of any act of Plaintiff.

Plaintiff asserts that if certain of the deficiencies alleged by Defendants be found to be breaches of contract by Plaintiff, the cost of remedying them is not as alleged by Defendants but is only $45.70, as set forth in Plaintiff's Exhibit C.

STIPULATIONS:

Facts under "UNDISPUTED FACTS".

It is stipulated that the following may be admitted without formal proof of authenticity, subject to all other objections:

Plaintiff's Pre-Trial Exhibits:

No. 1	Contract of August 12, 1963.
No. 2	Specifications.
Plaintiff's No. 3	Blueprints (to be initialled by both counsel prior to trial)
Plaintiff's No. 4(1) through 4(19)	Bills, as described on attached Plaintiff's Exhibit B (no stipulation that these were incurred in connection with the job in question)
Defendant's Pre-Trial Exhibit No. 1	Photocopy of letter dated 3/2/64 from Hires Turner Glass Co., to Defendant Claude G. Walker

Any other documents initialled by both counsel prior to trial.

Counsel for Defendants agrees that counsel for Plaintiff may have an expert inspect the premises 3103 Georgia Ave., N.W. in the light of the new list of deficiencies claimed as per Defend-

ants' Exhibit A, furnished at pretrial, on or before January 25, 1965, provided such inspection shall not interfere with trial date.

Counsel agree to exchange on or before January 25, 1965, the names and addresses of all witnesses known to them, including expert witnesses but exclusive of impeachment witnesses (filing a copy of said list with the Clerk of the Court), and if they learn of any additional witnesses prior to trial, they will advise the Clerk of Court and opposing counsel the names and addresses promptly and prior to trial.

Counsel for Defendants agrees to furnish counsel for Plaintiff copies of Defendant Claude G. Walker's Federal income tax returns for the years 1962 to date, including his return for 1964, if filed, and in the absence of a 1964 return figures as to said Defendant's claimed earnings during the period he alleges loss of earnings in 1964, on or before January 25, 1965.

The Examiner has requested counsel to come to the trial with the maximum authority to settle the case which will be allowed them by their principals.

Trial Attorneys: For Plaintiff - Robert H. Cooke
For Defendants - John D. Fauntleroy

ASSISTANT PRETRIAL EXAMINER

[Filed July 13, 1965]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for trial by the Court without a jury. The Court having heard and examined the testimony of the witnesses and the arguments of counsel for the parties, finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. On or about August 12, 1963 the plaintiff and the defendants entered into a written agreement by the terms of which the plaintiff was to renovate, repair and alter a building owned by the defendants located at 3103 Georgia Avenue, N.W., Washington, D. C.

2. The contract price was $49,995.00 to be paid in four equal installments of $12,498.75 as work reached certain stages.

3. The defendants arranged financing with the Petworth Branch of the Industrial Bank of Washington, which agreed to make available the contract price and to disburse the same in draws to be approved by a Mr. R. C. Archer, an architect. These terms and conditions were approved by the plaintiff.

4. Three installments of $12,498.75 each were paid to plaintiff on October 28, 1963, November 21, 1963 and December 19, 1963 respectively, after Mr. Archer, the architect, had certified to the bank that the work had progressed to the required point and that the work was satisfactory.

5. The work was completed on or about February 17, 1964 and the plaintiff thereupon made his demand for final payment. The architect certified to the bank that the work had been completed and that the final payment was accordingly due. The defendant Claude G. Walker indicated his approval of the final payment by affixing his signature to the statement rendered by the plaintiff.

6. Before the bank could disburse the funds, however, a stop order was placed with the bank by the defendants alleging that the plaintiff had failed to perform the contract in a workmanlike manner and in accordance with the plans and specifications agreed upon.

7. In the meantime, and during the course of performance of the contract, certain extra work was performed by the plaintiff

at the request of the defendants. The plaintiff asserted that the fair market value of the services so rendered was $5,263.03.

8. Upon the refusal of the defendants to permit the bank to disburse the last installment, and the further refusal of the defendants to pay for the claimed extras, the plaintiff caused a notice of intention to hold a mechanic's lien upon the premises to be filed with the Clerk of this Court on March 9, 1964, such notice being numbered 78-'64. Subsequently, plaintiff filed the complaint herein to enforce the mechanic's lien and to seek additional relief, and defendants thereupon filed a counterclaim asserting $3,000 damages due to poor and inferior workmanship and personal loss in the amount of $2,000 to the defendant, a physician, by reason of being unable to occupy the premises within the period specified by the contract.

9. By a clear preponderance of the evidence the plaintiff established that the work called for by the contract was performed in a workmanlike manner, and by the same token the defendants failed to adduce any convincing proof that the work did not meet required standards.

10. By a clear preponderance of the evidence the plaintiff established that extra work was performed at the request and with the approval of the defendants to a reasonable value of $4,913.03.

11. The defendants offered no proof in support of their counterclaim.

CONCLUSIONS OF LAW

1. The plaintiff having performed the work called for by the contract in a workmanlike manner is entitled to recover the agreed value thereof,

2. The plaintiff having performed certain extra work at the request and with the approval of the defendants is entitled to recover the reasonable value thereof,

Accordingly judgment will be entered for the plaintiff in the sum of $17,411.78 against the defendants.

/s/ HOWARD F. CORCORAN
Judge

July 13, 1965

[Filed July 13, 1965]

ORDER

It is by the Court, this 13th day of July, 1965:

ORDERED that the plaintiff Emmett C. Wade recover from the defendants Claude G. Walker and Maude Josephine Walker the sum of $17,411.78 with interest from March 9, 1964.

/s/ HOWARD F. CORCORAN
Judge

[Filed July 23, 1965]

AMENDMENT TO ORDER OF JULY 13, 1965

It is by the Court, this 23rd day of July, 1965:

ORDERED that the following paragraph be added to, and hereby is, made part of, this Court's Order of July 13, 1965:

"AND IT IS FURTHER ORDERED that the defendants shall have twenty-one (21) days from July 23, 1965 to pay and satisfy the judgment and interest thereon to plaintiff or, in default thereof, the Court will enforce the remedies available under the mechanic's lien pursuant to Title 38 of the District of Columbia Code."

/s/ HOWARD F. CORCORAN
Judge

[Filed August 20, 1965]

NOTICE OF APPEAL

Notice is hereby given this 20th day of August, 1965, that the defendants, Claude G. Walker and Maude Josephine Walker hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 13th day of July, 1965 as amended by the Order of this Court entered on the 23rd day of July 1965 in favor of the plaintiff, Emmett C. Wade, for $17,411.78 with interest from 3/9/64 against said defendants.

JOHN D. FAUNTLEROY
Attorney for Defendants

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

[8] EMMETT C. WADE

* * *

DIRECT EXAMINATION

BY MR. COOKE:

Q. Would you state your full name, Mr. Wade? A. Emmett C. Wade.

Q. And your occupation and address? A. I am a contractor. I live at 1914 Newton Street, Northeast.

Q. You, of course, know the defendant Mr. Claude Walker? A. Yes, I do.

Q. Would you point him out? A. He is the gentleman with the bow tie on.

Q. Mr. Wade, under what circumstances did you become acquainted with Mr. Walker? A. Well, I met Dr. Walker years ago in discussing heat pumps.

Q. Did there come a time when you entered into a business arrangement with him? A. Yes, sir, I did.

Q. When and where was that, Mr. Wade? [9] A. Well, in the spring of 1960, Dr. Walker brought me a set of plans and specifications, and asked me to give him a bid on this proposed renovation.

Q. Now, who was the author of those plans? A. Mr. Lewis Giles.

Q. Now, did Mr. Walker supply you with a copy of the specifications? A. Yes, he did.

Q. Now, what if anything did you do following that? A. Well, I inspected the property and I figured out a price and I turned in to him a proposal.

Q. When did this take place? A. This was in the spring of 1963.

Q. Now, when the doctor supplied you with a copy of the plans and specifications, where were you at that time? A. I was working on

another job at 14th and Corcoran Street, Northwest.

Q. And that is where the doctor brought the plans and specifications? A. That is correct.

Q. Did he leave those plans and specifications with you at that time? A. Yes, he did.

Q. Now, how soon afterwards was it that you inspected the premises? [10] A. The next day.

Q. Where were these premises? A. 3103 Georgia Avenue, Northwest.

Q. Is that the building owned by Dr. and Mrs. Walker? A. That is right.

Q. Now, upon inspecting these premises, what did you do? A. I checked them against the blueprints and specifications in order to figure out a price along the lines of the blueprints and specifications.

Q. Did you subsequently notify him of the cost? A. Yes, I did.

Q. And in what manner did you submit this cost to him? A. I presented him the proposal attached to the back of the specifications with the price on it.

Q. What was that price, Mr. Wade? A. $49,995.00.

Q. Now, what precisely were you required or did you contract to do for this money? A. The entire renovation according to the plans and specifications.

Q. Now, do you recall what work -- Was the work spelled out that you were supposed to do? A. Yes, it was.

[11] Q. Do you recall exactly what that work was? A. Well, it was an old building that had been started many years ago by someone else and I had to go in and tear out all the old partitions, lower the basement, put in sanitary lines, new storm sewer, 12 bathrooms, 26 hand bowls, three showers, tile wainscote in bathrooms and treatment rooms 42 inches high; put in new tile floors as called for by the speci-

fications, panel walls, new ceilings –

THE COURT: Is this all reflected in the contract?

MR. COOKE: Not quite in detail, Your Honor. There is more general language used, I believe.

THE COURT: Go ahead. I thought perhaps we could save some time.

BY MR. COOKE:

Q. Would you, as best as you can, explain it as it appears in the contract. A. Well, in the contract starting at the first payment, I was to go in and do all the demolition, excavation and underpinning the walls, remove all the existing heating pipes, put in the new waste lines, storm sewer lines.

Q. Now, when was this contract signed? A. This was signed August 12th.

Q. Now, when did you commence working? A. The 1st of September.

[12] Q. Was there any reason why you did not commence before the 1st of September? A. Well, the doctor explained that his financing wasn't completed yet.

Q. Now, were you notified when it was completed? A. Yes, he called me and told me that it was completed and I could start to work.

Q. When was that? A. That was the 1st of September.

Q. Did you in fact commence work? A. Yes, I did.

Q. Did you complete the first phase as you have just described to the Court? A. Yes, I did.

Q. Now, when did you complete that? A. Approximately the 10th of September.

Q. That was the 10th of September of 1963? A. 1963.

Q. Now, upon completing that, did you make any request for payment? A. Yes, I did.

Q. And what if anything occurred then? A. Well, the president of the bank informed me that the loan hadn't been completed.

[13] MR. FAUNTLEROY: I object, Your Honor, to hearsay.

THE COURT: Objection sustained.

BY MR. COOKE:

Q. Just state what occurred, not what someone told you. A. The loan had not been completed.

Q. Did you receive your payment at that time? A. No, I didn't.

Q. Now, had you and the owner, Dr. Walker, had an understanding that you would commence when the financing was completed? A. Yes, we did.

Q. Was it your impression when you commenced work that the financing had been completed? A. Yes, it was.

Q. Did the doctor in fact tell you that it had been completed? A. Yes, he did.

* * *

[14] Q. Now, upon completing the first stage of this work as you have testified, or after completing it, how long was it before you received your first draw? A. From approximately the 10th of September to the 1st of November, 1963.

Q. You received your first draw when, now? A. The 1st of November, 1963.

Q. I see. Now, upon completing -- Strike that, please. Upon receiving this draw, did you commence work immediately thereafter? A. Yes, I did.

Q. Now, what did you do or what were you required to do before the second draw would become due? A. Well, we had to what we call rough-in all the electric fixtures, put in the stud walls for partitions, have the preliminary electrical equipment inspection.

Q. Was this done? A. Yes, it was.

Q. Now, what did you do after that, if anything? A. I put in my request for payment and had it inspected.

Q. Who approved the work done? A. Mr. R. C. Archer.

Q. Now, were any objections raised to your payment by the defendant on either one of these occasions? [15] A. No, there wasn't.

Q. Did you receive the second draw without any problems? A. Yes, I did.

Q. Now, what time did you receive that draw, if you know? A. That was close to the end of November.

Q. Now, did you continue working on the premises? A. Yes, I did.

Q. Now, what did you do after this second draw? What did you do by way of complying with the contract? A. After that draw, it was the closing-in, putting up the paneling, plastering, finishing the duct work, pouring concrete floor, putting the tiles in the bathrooms, and tiles in treatment rooms.

Q. Now, did there come a time when you made a request for a third installment? A. Yes.

Q. Were there any objections raised by Dr. Walker at that time? A. No, there was not.

Q. Did you receive this installment? A. Yes, I did.

Q. By the way, what were each of these installments that you recieved? [16] A. $12,475.

Q. Would your recollection be off on that amount? A. Well, by a few dollars.

Q. If I was to say $12,498.75, would that be correct? A. Yes.

MR. FAUNTLEROY: I think the contract speaks for itself. Counsel shouldn't testify.

THE COURT: Are you going to put the contract in?

MR. COOKE: Yes, Your Honor.

Your Honor, I move that the contract, the plans and the specifications be admitted in evidence as Plaintiff's exhibits.

THE DEPUTY CLERK: Plaintiff's Nos. 1 and 2 for identification.

(Plans and specifications were marked Plaintiff's Exhibits Nos. 1 and 2, respectively, for identification.)

MR. COOKE: Your Honor, it appears that the contract is not among the papers.

THE COURT: Do either of you gentlemen have a copy that you could stipulate to?

MR. COOKE: Yes, Your Honor, I have one.

MR. FAUNTLEROY: All right. I will stipulate to it, Your Honor.

[17] THE DEPUTY CLERK: Plaintiff's No. 3 for identification.

(Contract was marked Plaintiff's Exhibit No. 3 for identification.)

THE COURT: You are sure this is a true copy now?

MR. FAUNTLEROY: I have a copy here. I think it is a true copy.

THE COURT: Very well. It will be received.

You are offering all three, are you?

MR. COOKE: Yes, Your Honor.

THE COURT: There is no objection to the plans or specifications?

MR. FAUNTLEROY: No objection, Your Honor.

THE COURT: All three exhibits are admitted.

THE DEPUTY CLERK: Plaintiff's Nos. 1, 2 and 3 marked into evidence.

(Plaintiff's Exhibits Nos. 1, 2 and 3 for identification were received in evidence.)

BY MR. COOKE:

Q. Now, Mr. Wade, alluding to the last portion of your contract, what were the things to be done? A. The last part would be to put in the fixtures in the bathrooms, to do painting, do the touching up, the general finishing work.

[18] Q. Now, did there come a time when you completed this work? A. Yes, sir.

Q. Did you make a request for payment at that time? A. Well, it took me a little longer time. That is the office for the dentist and we had to do over the second floor front to meet the specifications of the dental supply people for the dental office.

Q. Well, was that considered an extra or part of the contract? A. That was an extra.

Q. Now, did you finally submit your request for final payment? A. Yes, I did.

Q. And were you paid? A. No, I was not.

Q. Was this final work approved by the architect, Mr. Archer? A. Yes, it was.

Q. Did the doctor himself approve this work? A. Yes, he did.

Q. Well, if he approved it, what happened if anything subsequently? A. Well, he approved it along with his architect and [19] signed my final request for payment which I took to Mr. Archer and he put mine in a sealed envelope with his final inspection report, and I took it to the bank. When I got to the bank, I was informed —

MR. FAUNTLEROY: I object to anything he was informed of, if Your Honor please.

THE WITNESS: When I got to the bank, I was told —

MR. FAUNTLEROY: I object, Your Honor.

THE COURT: Yes. Try not to say what you were told.

[19] THE WITNESS: When I got to the bank, I saw a telegram that the doctor had sent, asking that the payment not be made, that the ceiling didn't meet the fire code.

THE COURT: The ceiling didn't what?

THE WITNESS: Didn't meet the fire code.

BY MR. COOKE:

Q. Mr. Wade, was all this work on these premises inspected by the Building Inspector? A. Yes, it was.

Q. Do you know who the inspector or inspectors were? A. The Building Inspector -- The first Building Inspector was Mr. DeBose, who retired, and the next was a Mr. Connors.

Q. Now, in what manner did the inspectors indicate that the work was satisfactory? [20] A. We were given a complete satisfactory inspection report.

Q. Mr. Wade, would you tell the Court who financed this work for the defendant? A. The Industrial Bank of Washington.

Q. Are you familiar with the terms of the loan? A. That part pertaining to my contract, yes, sir.

Q. That is what I mean. A. Yes.

Q. Would you relate that for the Court? A. Well, we gave the bank a copy of the doctor's contract for $50,000 which was to be paid to me in four draws on a progress basis.

Q. Who was required to pay this money into your hands? A. The bank.

Q. Now, directing your attention to November 1st, at that time did you have any occasion to learn that the financing had not been completed? A. Yes, I did.

Q. Would you tell the Court how you learned this? A. I presented my request for payment and the financing had not been completed so they could not pay me.

Q. Now, Mr. Wade, what extras were you requested to perform for the defendant? [21] A. I may not have them in the order or sequence they are on the paper but I can give them all to you.

THE COURT: Were the demands for extras agreed at pre-trial?

MR. FAUNTLEROY: It should be attached to the pre-trial statement, Your Honor.

THE COURT: There is no objection to it, then?

MR. FAUNTLEROY: No objection, Your Honor. We don't admit these extras were performed.

THE COURT: No. I understand that. You do admit the claim in this form?

MR. FAUNTLEROY: Yes.

* * *

[21] (Bill for extras was marked Plaintiff's Exhibit No. 4 for identification.)

BY MR. COOKE:

Q. Could you identify this paper? A. Yes, I can.

Q. What is it? A. This is my request for extras for performance of the job.

[22] Q. This is a paper prepared and submitted by you? A. That is correct.

MR. COOKE: Do you care to see this, Mr. Fauntleroy?

(Document was shown to opposing counsel.)

MR. COOKE: Your Honor, I move Plaintiff's Exhibit 4 for identification be admitted in evidence.

THE COURT: Any objection?

MR. FAUNTLEROY: No objection. I take it that he is introducing this to show this claim was made upon the doctor. For that reason, we have no objection.

THE COURT: It will be received.

THE DEPUTY CLERK: Plaintiff's No. 4 marked into evidence.

(Plaintiff's Exhibit No. 4 for identification was received in evidence.)

BY MR. COOKE:

Q. Now, Mr. Wade, what were the extras and in what amounts were you requested to perform at premises 3103 Georgia Avenue? A. Completion bond to Suburban Lumber Company, $1,000 —

THE COURT: There is no point in reading this. It is already in evidence. The claim is in evidence.

MR. COOKE: Very well.

[23] BY MR. COOKE:

Q. Now, what was the total amount of your extras, Mr. Wade? A. $5,263.00.

Q. Mr. Wade, did you perform this work in a workmanlike manner? A. Yes, I did.

Q. Were all of the stages of your work approved by a bona fide architect? A. Yes, they were.

Q. Was this architect agreed upon by the defendants as well as yourself and the lender? A. That is correct, sir.

* * *

Q. Mr. Wade, what do you claim is the amount due you at this time? A. My final payment of $12,498.75 plus $5,263.00.

Q. Now, Mr. Wade, you made numerous demands for this money prior to filing a notice of lien, is that correct? A. Yes, sir.

Q. Did there come a time when you did file this notice of lien?

[24] A. Yes.

Q. When was that?

MR. FAUNTLEROY: We admit filing of the mechanics lien, Your Honor.

THE COURT: Well, fix the date in any event.

BY MR. COOKE:

Q. What was the date of the filing of the lien? A. February 18, 1964.

Q. The filing of the notice of lien? A. I am pretty sure that is right.

Q. Would it refresh your recollection if I stated it was March 9th, 1964? A. March 9th.

MR. COOKE: Nothing further at this time, Your Honor.

THE COURT: Do you wish to cross-examine?

MR. FAUNTLEROY: If it please the Court.

CROSS-EXAMINATION

BY MR. FAUNTLEROY:

Q. Mr. Wade, you mentioned that you obtained approval of an architect in this case. Now, was this approval given to you in writing or was it done orally? A. It was given in writing on a special form which was carried to the bank each time.

[25] Q. Was that for all four draws? A. All four draws.

Q. Do you have those with you? A. No, sir, they are in possession of the president of the bank.

Q. Did I understand you correctly to say that the work that you had done on this building has been completed fully? A. According to the plans and specifications, sir.

Q. Nothing remains to be done? A. Not according to the plans and specifications.

Q. I will ask you, Mr. Wade, did you install sinks on the third floor and two dental chairs there? A. No, sir, I did not install them.

Q. Did you see that they were installed? A. No, sir, I did not.

Q. Did you charge for this work? A. I charged — the plans and specifications stated that we were to rough-in for two dental operatories. When the doctor got this new tenant and, according to the plans given by the dental supply people, we then carried the lines in according to what he advised; but as far as setting down the chairs, the dental supply people did that, sir.

Q. But you did all the roughing-in and bringing the lines in, is that correct? [26] A. We roughed-in to a point and then under the direction of the dental supply people, we then carried the waste lines, gas lines, water supply lines, air lines to the place they designated on the plans so the chairs could be set down.

Q. The sinks that are on that third floor, did you have jurisdiction over installing those sinks? A. Sir, you mean hand bowls?

Q. Yes. A. Yes, I did.

Q. Now, did I understand you to say that the inspectors of the District of Columbia approved all of your work? A. Yes, sir.

Q. And you had no complaints from the inspectors, is that correct? A. I did not, sir.

Q. This approval that you are telling us about, was this done in writing or was this given to you orally? A. When the inspectors in-

spect, they do not give you an answer written or orally. It is turned in so you may get your occupancy permit.

MR. FAUNTLEROY: May I have this document marked as Defendants' Exhibit No. 1?

THE DEPUTY CLERK: Defendants' No. 1 for identification.

[27] (Document was marked Defendants' Exhibit No. 1 for identification.)

BY MR. FAUNTLEROY:

Q. I show you, Mr. Wade, this document dated June 10, 1965, from the Government of the District of Columbia, Department of Licenses and Inspections, and I will ask you to read it. A. "The above premises" —

THE COURT: Don't read it out loud. It is not in evidence yet.

THE WITNESS: (Perusing document) That is correct, sir.

BY MR. FAUNTLEROY:

Q. Now, is your answer, Mr. Wade, still that the inspectors have okayed all the work that you have performed in the building? A. Attorney Fauntleroy, we did notinstall the chairs or the sinks; those are installed by the dental people. We only prepared the work so that they can be installed. We had nothing to do with setting down those units oursevles. We don't touch that.

Q. Now, we are talking about the sinks. A. The sink that is there is a part of the dental supply.

[28] Q. I asked you the question before whether you had installed the sink. A. Well, sir, when you say "sink" — we are probably talking a little different language. If I am thinking of what you are talking about, we would say hand bowls, then we can differentiate. The sink is in the dentist's work table. That is part of the dental equipment; it is not a hand bowl.

Q. The sinks that were mentioned in this letter, did you install them? A. No, sir, we did not. Those were installed under the supervision of the Cosmetology Department of the District of Columbia.

[28] Q. Now, Mr. Wade, do you remember meeting up at the building with Dr. Walker and Mr. Cooke, the four of us, to inspect the premises and note any deficiencies? A. Yes, I do.

Q. Now, do you remember, sir, on the basement floor where Dr. Walker has his office, that the floor in the back of that basement area is unlevel? Did you note that? A. It is raised one half inch in the far end.

Q. Now, do you remember when that was pointed out to you? A. Oh, yes, I remember.

Q. Now, have you done anything to correct that?

[29] MR. COOKE: I object. I don't think there has been any finding that he was required to do that.

MR. FAUNTLEROY: I don't think it is time for the Court to make a finding. The question —

MR. COOKE: I don't think there has been any testimony that he was required to do it.

MR. FAUNTLEROY: The question was and I think the answer was before that that it was half an inch or an inch below grade level.

BY MR. FAUNTLEROY:

Q. Is that correct?

A. No, sir. It was raised one half inch at the far end to taper it so that we would not have to eliminate the back bathroom. Would you like me to go through the whole thing? Q. Yes. Suppose you explain that. A. All right, sir. In putting a waste line in, the measurement of the building is 78 feet from front to back, and from there to the sewer in the street, your waste line must fall one quarter inch to the foot. When we dug up the existing sewer in the street on Georgia Avenue and started back with our ditch, when we got to the back end, we had dug up too far. There wasn't enough drop in the city sewer to allow the waste line to be put in without having to raise the [30] floor at least a half an inch inside and then taper into the bathroom and step up like a

stairway so that you might have that bathroom; otherwise, according to the specifications, you could not have it.

Q. Are you telling us now that it would have been impossible for you to have leveled this floor in the basement rear of the property we are talking about? A. That is correct, sir, and stay within the plans and specifications.

Q. Well, you deviated from the plans and specifications when you altered --

MR. COOKE: I object, if Your Honor please.

THE COURT: That is proper cross-examination.

Go ahead.

BY MR. FAUNTLEROY:

Q. You deviated from the plans and specifications when you altered the heighth, the level of that floor in the rear of the basement, didn't you? A. I did it with the approval of the doctor's architect.

Q. Now, since you altered it to that extent, couldn't you also have made that basement floor level? A. No, sir. The existing white, shiny, brick walls were there before I started work. They were done by someone [31] else. And the openings, we have metal bucks, irons going out. It would have meant tearing out those doorways, tearing out the lintels at the top and raising the doorways, and also covering up the shiny, glazed baseboard before we started. And if we look at the plans, we see it was dropped down purposely to keep that baseboard, one step.

Q. As I understand your answer now, it could have been leveled off, that floor in the rear of the basement. A. Not in keeping with the plans and specifications.

Q. Do you remember, Mr. Wade, when we were up at the building at the front entrance of the building where you go down the steps to Dr. Walker's office, do you remember being shown loose tile in the entranceway? A. We pointed out a few loose pieces of tile but we stated that they did not exist at the time of final inspection. This was

one year later.

Q. You remember they were loose when you inspected the premises? A. One year later, yes, sir.

Q. Now, you don't really mean one year later. We were up there in January of 1965, were we not? A. We did that in January of 1964 — before January '64.

Q. As I recall your telling us about entering into [32] this contract, did you not enter into this contract on August 12th, 1964? A. The doctor signed the contract on August 12th, 1964.

Q. And you didn't install the tile the January before that, did you? A. I installed it the following January.

Q. Now, you also remember when we were at the premises you were shown a wall on the left side of the building going back towards the end of the building where it was not furred and there was loose plaster coming off of the wall. Do you remember being shown that? A. I remember being shown the space where there was powder.

Q. Yes. And we were all present there and didn't we also go outside the building to determine whether or not there was any attached building to that portion of the wall? A. Yes, we did.

THE COURT: Could we fix the date of this inspection?

MR. FAUNTLEROY: Yes, Your Honor.

BY MR. FAUNTLEROY:

Q. This inspection was approximately January 1965,is that correct? A. Not that inspection, no, sir. Mr. Cooke, you were with us.

[33] MR. COOKE: I believe the inspection was after the filing of the notice of lien which would have made it after March.

THE COURT: Of this year?

MR. COOKE: Of 1964, Your Honor.

THE COURT: The contract wasn't entered into until August 1964.

THE WITNESS: 1963, Your Honor.

THE COURT: I think the plaintiff made an error earlier.

MR. FAUNTLEROY: Maybe I can refresh your recollection. We did have two inspections. We went up there twice. Now, the first time, I think, was around October. Then there was a subsequent inspection made in January of 1965 and I called your attention on January 4th, 1965, this pretrial order was issued and it was agreed that you would be entitled to make another inspection of the premises with your architect and I think that was done soon thereafter.

Do you recall that, Mr. Cooke?

MR. COOKE: I do recall a recent inspection.

BY MR. FAUNTLEROY:

Q. To the best of your recollection, what date would you say that you were up there to inspect the building? A. Which one? I was there both times.

[34] Q. All right. When was the first time you were up there to inspect the building? A. It should have been around October.

Q. When was the second time you were there to inspect the building? A. The first part of this year.

Q. Around January of 1965? A. That is right.

Q. Do you remember being shown that portion of the wall on the left side as you go back into the basement? A. Yes, I do. I measured it for you.

Q. And do you remember us going outside of the door and inspecting the premises and that we found no adjoining building attached to that portion of the wall? A. At that time, but the garage in the back had been torn off since the construction of that back part. The plans and specifications state that I was to fur-up any weather-exposed wall. During the time of construction, that wall was not weather exposed; the neighbor had not torn down the brick garage.

Q. Now, so you can explain to us a little more fully what do you mean by furring the walls? Why would you fur the walls? A. Furring a wall in this case means using 1 by 2 [35] furring strips. In other words, moving the wall out from the cinderblocks, in this case,

leaving air space behind it.

Q. And that is to prevent moisture, is it not, to creep into the wall and make it disintegrate or make it -- A. Right. That is why it stated "all weather-exposed walls."

Q. Now, will you tell us when this garage was taken down that you spoke of? A. It was after we plastered those walls. I don't know exactly when it was. I wasn't there.

Q. Do you know approximately when you plastered the walls? A. The plastering of the walls was completed for the third draw, which was finished the first part of December 1963.

Q. Now, do you admit that as of this time that this exposed wall is defective? A. I will admit that the garage next door was torn down and that wall is not bricks like the rest of it and it is possible for rain to get in, but it wasn't possible at the time of construction.

Q. Do you admit now that it is defective? A. There are a few powdering spots but I would not be responsible for that.

[36] THE COURT: Is it within the scope of the contract?

MR. FAUNTLEROY: Yes, we claim it is, Your Honor.

THE COURT: Even if it was torn down after the work was done?

MR. FAUNTLEROY: We don't concede that at all.

THE COURT: Very well. Continue.

Q. Now, Mr. Wade, do you remember us going to the first floor of the building and inspecting the rooms there? Directing your attention back to the rear of the first floor, do you remember a room that was paneled in the extreme rear of the building on the first floor? A. Yes. I know what you are talking about.

Q. Now, isn't it a fact that those panels in that room were cut too short and they were patched up? A. I am very sorry, they were not cut too short; there was an adjustment made overhead for the drop ceiling and on the one panel -- well, not a half an inch from the top, a piece was pieced which could be used by using a half-inch piece of

molding. But the man measured it so close, unless you were looking for something, you wouldn't be able to find it. The man was a master carpenter that did it.

Q. Isn't it a fact, Mr. Wade, that in that room, the rear room on the first floor, that there are numerous panels [37] in that room that have been patched up with pieces to make them extend the full length of the wall? A. No, sir.

Q. Do I understand by your answer that it is only one panel in that room? A. One panel. That would be on the north side of that room as you come in the door.

Q. And all of the other panels, you say, are all right; is that correct? A. That is right.

[37] Q. They are not pieced? A. They are not pieced.

Q. Now, directing your attention to the basement floor, as I understand it — you can correct me if I am wrong — but the specifications call for vinyl floor tile to be laid in the basement. Was vinyl floor tile laid in the basement? A. Mr. Fauntleroy, I don't think the word "vinyl" is mentioned at all in the entire specifications.

Q. Will you tell us what your understanding of the specifications are?

THE COURT: Aren't the specifications in evidence?

MR. FAUNTLEROY: Yes, they are, Your Honor.

THE COURT: What do the specifications call for?

[38] MR. FAUNTLEROY: I am reading from Item 35 of the specifications under tile work: "Floor tile shall be ceramic mosaic, the tile in stair hall to match existing tile". Then we skip a piece that is not important. Then we have, "ROBCO 3/8 Vitri Neer 16 V series."

THE WITNESS: That is not floor tile and that was eliminated from the contract completely.

BY MR. FAUNTLEROY:

Q. What type of tile did you understand was to be put in? A. I checked with Mr. Giles, the architect, and I brought the doctor numer-

ous samples and on the top two floors, we used vinyl asbestos and in the basement, we used asbestos because it was below grade and we allowed him to make his choice.

Q. Well, whose choice was it to put asbestos on the basement floor? A. Well, the doctor selected from the choices that we had and it was concurred with the architect since it was below grade, it was the best thing to be used.

Q. Did you install that hot water heater that was called for by the specifications? A. I supplied one, but the doctor brought his own in and had our men to install it.

[39] Q. Now, will you tell us about the installation of the Thinlite glass panels that you installed? I think you had to make a deviation from the contract there, did you not? A. I did not make a deviation, sir.

Q. What did you do, sir? A. The deviation was made by Dr. Claude G. Walker and the architect, Mr. Giles, who said he wanted Pittsburg glass. I merely supplied Pittsburgh glass with a set of plans. The doctor made his own selection and drew his own design for the windows.

Q. Now, was there a substitution made in the type of paneling, glass paneling that was actually used on the building? A. It wasn't made by me.

Q. You are saying, then, that it was made by Dr. Walker and the architect, is that correct? A. That is correct.

* * *

Q. Now, Mr. Wade, do you remember at the time of the last inspection -- and I believe at the first inspection also -- that the four of us went outside to examine the rear of the building? [40] A. Right.

Q. Now, do you remember being shown not the sill but do you remember the installation of the windows on the rear of the building? Do you remember being shown places where they were not caulked so

the air was leaking through those windows? A. Mr. Fauntleroy, you all pointed to a window and I would say your eyesight was much better than mine because I was never able to see it.

Q. In other words, you are saying no empty spaces or non-caulked spaces were shown to you on that day? A. I couldn't see any. We stood back in two rooms on the inside and you said you saw them but I never could find them and I couldn't find them on the outside.

Q. Directing your attention, then, back to the first meeting, don't you remember being shown these places and don't you also remember it being called to your attention that the rear of the building had to be painted and you said -- that the piping had to be painted and you told us that this could not be done until, what did you say, about six months after the job is completed? A. That is the general practice, sir. That galvanized downspouting has an oil finish on it and if you put paint on it before it stays in the weather for a while, the paint will pop off so it is always left unpainted.

[41] Q. Now, at that time don't you remember that this work remained undone? A. The galvanized downspout was not painted.

Q. Yes. You remember that portion of work was not done? A. Well, it didn't state in the specifications for me to paint the downspouts because I was doing the construction, I couldn't have left it there long enough for the weather to get to it to take the oil off.

Q. Didn't you agree that this was supposed to be done about six months after the job? Isn't that what you told us? A. That is correct. That is the usual time it is painted, the earliest time.

Q. Did you do it about six months after the job? A. No, I did not.

Q. Did you do it up to the present time? A. No, sir, I have not. There is one downspout coming from the second floor roof to the cast iron waste line; that is the only one we have in the building.

Q. Now, under the plans and specifications -- and now I am reading from general conditions, Item 7 --

THE COURT: What page is that on?

MR. FAUNTLEROY: That is on page 1 of the specifications, Your Honor.

[42] BY MR. FAUNTLEROY:

Q. You were required to furnish a satisfactory performance bond guaranteeing completion of the work, is that correct? A. No, sir. The owner did not request me to supply one because it would have increased the whole price of the job.

Q. Then, I show you this Item 7 -- A. I am aware that it is written there. We discussed it at that time.

Q. Is there any place in those specifications where this was to be done only upon the request of the owner? A. Well, that was discussed with the owner because to buy a performance bond, it would cost a considerable sum of money and the doctor was trying to save money.

Q. Was this discussed before the contract was signed? A. Yes, it was.

Q. Well, if that be so, why wasn't it stricken at that time? A. It was. I didn't deliver him one. He didn't ask for one.

Q. Item 7 of the general conditions requires that you furnish a satisfactory performance bond. A. The doctor did not want to pay for the performance bond.

[43] Q. Do you agree that you were to furnish all work, material and other items that are stated in the specification? A. Yes, I do.

Q. And the specifications show that you were to furnish a satisfactory performance bond guaranteeing completion of the work. A. Well, that was discussed before signing of the contract. It was discussed where it would have to be bought and that it would cost sometimes as much as five per cent of the cost of the contract, which would increase the total price of the job.

Q. Well, will you tell us, then, what is the usual price of a performance bond? A. Around five per cent.

Q. That is customary? A. It is customary to my knowledge. It depends on who you are dealing with.

Q. And as I understand your testimony, you did not furnish a performance bond because you say Dr. Walker didn't request one, he wanted to keep the price down; is this correct? A. That is correct.

* * *

[44] MR. FAUNTLEROY: I believe, Your Honor, in our pre-trial statement we have admitted that Items 9 and 14 are proper extras which the defendant would be entitled to pay for.

BY MR. FAUNTLEROY:

Q. Now, with reference to — A. May I have the list of extras on the desk so I may follow?

Q. Yes.

(Document was handed to the witness.)

THE COURT: Item 9 is the three sheets of oak paneling and 14 is the electric service.

BY MR. FAUNTLEROY:

Q. Now, with reference to these other extras that you have listed on the sheet of paper, was there any agreement in writing for this work to be done or was it done orally? A. Well, some orally and some that was set out in the plans and specifications where there was an allowance of X number of dollars to do so-and-so, and it didn't cover enough to take care of the total amount.

Q. Now, other than where those provisions are made in the specifications, are those claims for extras — were they authorized in writing or were they authorized orally? A. Orally.

[45] Q. Do you have any memorandum of anything where the defendants agreed to pay for these extras? A. Yes. I think it says on the bottom of this -- At one time when he was getting extras, he wanted me to take it back in a deed of trust note.

THE COURT: He wanted you to take it back in what?

THE WITNESS: Second trust note.

BY MR. FAUNTLEROY:

Q. Is the signature of Dr. Walker on that paper? A. Not on this one.

Q. Well then, Dr. Walker didn't agree to it. A. He hasn't agreed to pay anything.

Q. That is what I want to get straightened out with you. Just one further question and I think we can clear this up: Going back to that Thinlite panel glass that we were talking about a little earlier, I think a substitution was made in the plans and specifications which you say Dr. Walker authorized. Would you tell us how much that substituted glass cost over the glass that was to be authorized in the specifications? Is that Item 7 where you have $800? A. Yes, 800; that is correct.

Q. Now, will you tell us what was the approximate cost of the glass from Thinlite Panel Construction that was to be ordered from Hires Turner?

[46] A. I have the contract.

Q. You have the contract? A. Yes.

Q. May I see it, sir?

(Document was handed to counsel by Mr. Cooke.)

BY MR. FAUNTLEROY:

Q. Do you also have a contract for the glass paneling that you did install? A. Yes, sir.

MR. FAUNTLEROY: Do you have it, the glass paneling that was installed? Do you have that?

(Document was handed to counsel by Mr. Cooke.)

(Counsel conferring privately.)

THE COURT: Mark any documents for identification before you talk about them.

MR. FAUNTLEROY: Yes, Your Honor. Will you mark this as Defendants' Exhibit No. 2, please.

THE DEPUTY CLERK: Defendants' No. 2 for identification.

(Contract for glass paneling was marked Defendants' Exhibit No. 2 for identification.)

MR. FAUNTLEROY: And will you also mark this for identification, please.

[47] THE DEPUTY CLERK: Defendants' No. 3 for identification.

(Document was marked Defendants' Exhibit No. 3 for identification.)

BY MR. FAUNTLEROY:

Q. Now, I show you what has been marked as Defendants' No. 2 for identification and ask you if you can identify it? A. (Perusing document) Yes, I can.

Q. Is that the glass paneling that was installed at the office of Dr. Walker? A. This is the cost of the glass block, not including the labor to put it in.

Q. Now, I show you what has been marked as Defendants' Exhibit No. 3 for identification and ask you if you can identify that? A. Yes, I can.

Q. Will you tell us what that is, sir? A. This is a copy of a contract with Hires Turner, signed by Mr. Foley.

Q. Now, with reference to Defendants' Exhibit No. 3, which is the glass called for by the plans and specifications, what is the price of that contract? A. $2,700.

Q. Now, with reference to the glass that was actually

[48] installed in the building of the defendants, which is identified as Defendants' Exhibit No. 2, will you tell us what the cost of that is? A. Well, this is the actual cost of the glass blocks but not the aluminum, just the bricklayer's charge and the cost of the mortar plus the expansion joints and the aluminum frames that go around it.

(Document was handed to counsel by Mr. Cooke.)

MR. FAUNTLEROY: Would you mark these as Defendants' Exhibit 4 for identification?

THE DEPUTY CLERK: Defendants' No. 4 for identification.

(Bill for glass was marked Defendants' Exhibit No. 4 for identification.)

BY MR. FAUNTLEROY:

Q. I show you what has been marked for identification as Defendants' Exhibit No. 4, which seems to be an additional cost for the glass that was to be used in the building. Now, does that complete the actual cost of the glass? A. No, sir. In the complete price of the glass, it also included some Blue State Slate that we used in the back of the building instead of aluminum which is far too expensive to go all over the building, and the $500 charged by the bricklayer who laid the glass blocks.

[49] Q. Now, directing your attention to Item 7 in your request for extras, you have this: "Item 7. Extra cost of glass over original price given by Hires Turner, $800."

Do you still say this is correct? A. Yes, sir. I also have one more that didn't come from Pittsburgh Glass. That is the awning windows that was requested by the doctor that was supplied by the supplier.

Q. Do you agree that the labor for the installation of this glass paneling that you have told us about was already included into the contract? A. It was included and set out in Hires Turner contract but not in this one.

THE COURT: When you say "this one," you mean the basic contract?

THE WITNESS: No. When we got the glass from Pittsburgh, that was just the actual cost of the glass. We had to furnish the labor ourselves.

BY MR. FAUNTLEROY:

Q. Now, are you telling us that with reference to Defendants' Exhibit No. 3, the Hires Turner Glass Company, the original glass that

was to be installed in the building, that that estimate cost included the glass and installation? A. And installation. See that glass came in banks all ready to set in the holes.

[50] Q. Now, if you had accepted the contract from Hires Turner, would you have had to install any portion of this glass or any work commensurate with it? A. I did accept the contract and according to the contract, I wouldn't have had to install it.

MR. FAUNTLEROY: Would you mark this as Defendants' Exhibit No. 5, please?

THE DEPUTY CLERK: Defendants' Exhibit No. 5 for identification.

(Bill for glass was marked Defendants' Exhibit No. 5 for identification.)

BY MR. FAUNTLEROY:

Q. Now, I show you what has been marked as Defendants' Exhibit No. 5 for identification. Now, would that include the cost of the glass and the labor involved for the substitute that was used on the building? A. No, sir, there is one more.

Q. What is that? A. That is on the pink slip, was supplied by the supplier, the awning windows for the front and back windows. Mr. Cooke has that.

(Document was shown to counsel by Mr. Cooke.)

BY MR. FAUNTLEROY:

Q. Now, including that amount which is $371.30, would [51] that include the entire cost of purchasing the glass and installing the glass in the building? A. Yes, sir.

THE COURT: Would you clarify this for me.

MR. FAUNTLEROY: Yes, Your Honor.

THE COURT: What includes the entire cost, 2, 3, 4 and 5?

MR. FAUNTLEROY: No, Your Honor. I believe it is — let's see —

THE COURT: Are you going to put them in evidence?

MR. FAUNTLEROY: They would represent Defendants' Exhibits No. 2, 4 and 5 plus an additional item of $371.30.

THE COURT: Very well.

MR. FAUNTLEROY: I have no further questions, if Your Honor please.

THE COURT: Is there any redirect, Mr. Cooke?

MR. COOKE: Yes, Your Honor, a couple of questions, if Your Honor please. Your Honor, with respect to the yellow paper or pink paper which counsel has alluded to, from which he quoted the sum of $371.30, I would like to have that marked for identification.

THE DEPUTY CLERK: Plaintiff's No. 5 for identification.

[52] (Bill for awnings was marked Plaintiff's Exhibit No. 5 for identification.)

REDIRECT EXAMINATION

BY MR. COOKE:

Q. Mr. Wade, does this paper represent an additional expense by reason of your having to buy Pittsburgh glass? A. Yes, it does. The glass that I purchased from Pittsburgh was selected by the doctor himself and he selected very expensive blocks.

[52] MR. COOKE: Your Honor, at this time I move that the Plaintiff's Exhibit No. 5 as well as Defendants' Exhibits 2, 4 and 5 be admitted into evidence.

THE COURT: Any objection?

MR. FAUNTLEROY: I have no objection, Your Honor.

THE COURT: They will be admitted.

MR. COOKE: Thank you, Your Honor.

THE DEPUTY CLERK: Plaintiff's Exhibit No. 5, Defendants' Exhibits Nos. 2, 4 and 5 marked into evidence.

THE COURT: What happened to No. 3? What is that?

MR. FAUNTLEROY: No. 3 is Hires Turner contract.

MR. COOKE: Your Honor, I amend my motion to include Defendants' Exhibit No. 3

MR. FAUNTLEROY: I have no objection to its admission into evidence.

[53] THE COURT: It will be admitted.

THE DEPUTY CLERK: Defendants' No. 3 marked into evidence.

(Plaintiff's Exhibit No. 5 and Defendants' Exhibits Nos. 2, 3, 4 and 5 for identification were received in evidence.)

THE COURT: Now, will you help the Court out and tell me what 2, 3, 4 and 5 are about.

THE WITNESS: I don't have them in order. When we did not receive the glass from Hires Turner, the Doctor's architect asked me to take a set of plans to Pittsburgh Plate Glass, and Pittsburgh Plate Glass doesn't carry some of the things that we had to get from other places. One is the glazing and the brick mason's cost. Another is awning windows that the doctor asked the supplier to have made up for him, which Pittsburgh Glass doesn't supply. And too, the Pittsburgh Glass, they have a contract department and a glass block department. The contract department took care of the glass doors, and the block department supplied the blocks. That is why we have two different bills from them.

THE COURT: These are the bills for the glass?

THE WITNESS: Yes.

BY MR. COOKE:

[54] Q. Mr. Wade, why was it that you ordered glass from Hires Turner in the first instance? A. Well, the doctor had been dealing with Hires Turner and when I got the job, Hires Turner already had a set of plans and specifications and it was stated in the specifications that we were to use Hires Turner.

Q. It was at the request of the defendants that you placed this order with Hires Turner? A. Yes. It had been placed before I even

got the job. Mr. Foley came over with the doctor and I was introduced to him and we discussed the contract.

Q. Then did Hires Turner produce this glass under the contract? A. No, they did not.

Q. And is that the reason why some other company had to be resorted to? A. That is correct.

Q. Who picked the company of Pittsburgh Glass? A. Mr. Giles.

Q. And Mr. Giles is the defendants' architect? A. Yes, he is.

Q. Was the defendant aware of this? A. Yes, he was.

Q. Did he consent to this? [55] A. Yes, he did.

Q. Now, Mr. Wade, with reference to the basement floor that you described on cross-examination, when was that floor completed as it now stands? A. That was before I made my third draw.

Q. At that time did the doctor raise any objections to it? A. No, he was happy that we could save the bathroom.

Q. Was it a question of saving the bathroom or arranging the floor differently? A. That is correct.

Q. And he wanted to save the bathroom? A. He wanted the bathroom.

Q. Now, with reference to the tile, I believe you stated that the architect chose the tile for the floor; is that correct? A. No, I discussed it with him. The doctor chose the tile.

Q. On any occasion did you make a substitute or deviation or produce or arrange an extra without the consent of the doctor, the owner? A. No, I did not.

Q. Before entering into any deviations or additions, did you at all times apprise the doctor of the difference in the cost or an estimated difference in the cost? [56] A. Yes, I did.

Q. Did at any time he raise any objection while you were discussing it or doing the work? A. No, he did not.

MR. COOKE: That is all, Your Honor.

MR. FAUNTLEROY: No further questions.

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[59] B. DOYLE MITCHELL

* * *

DIRECT EXAMINATION

BY MR. COOKE:

Q. Mr. Mitchell, would you state your full name, please? A. B. Doyle Mitchell.

Q. And your occupation or profession? A. I am president of the Industrial Bank of Washington, D. C.

Q. Mr. Mitchell, do you know the defendants in this case, Dr. and Mrs. Claude Walker? A. I know Dr. Walker because I have had dealings with him. I would not know personally Mrs. Walker.

Q. I see. Now, on what occasion did you have business with Dr. Walker? [60] A. Early 1963, we had an occasion to have an application to be placed at our bank for a loan on premises 3103 Georgia Avenue, Northwest, by Dr. Walker.

THE COURT: What was the date of that, Mr. Mitchell?

THE WITNESS: (Perusing papers) Unfortunately, the date was not placed on the application itself. However, we have a date of approval.

THE COURT: Was it spring or summer?

THE WITNESS: In the spring of 1963. The date of approval was May 23rd, 1963.

BY MR. COOKE:

Q. Now, Mr. Mitchell, what was the nature of this loan? A. This loan was for the purposes of improving the premises of 3103 Georgia Avenue, Northwest, by means of almost a complete renovation of the building for purposes of having offices in the building.

Q. If you know, who was to renovate these premises? A. There was to be a renovation by a person by the name of Emmett C. Wade.

Q. Now, this application was made and you say it was approved, is that correct? A. That is correct.

Q. Now, when was this work commenced, to your knowledge? [61] A. I have no idea when the work was commenced.

Q. Now, how was this loan to be paid? A. The loan was to be payable $400 per month, with the first payment starting approximately 30 days after the estimated time of completion.

Q. You are referring, of course, to the repayment of the loan to the bank, is that correct? A. Oh, yes.

Q. How were you to advance this loan to the borrower, to the defendants, Mr. and Mrs. Walker? A. We requested that a schedule of draws be submitted by the contractor and that each draw would be approved by Mr. R. C. Archer, who was an architect to look after our interest.

Q. Now, what was the full amount of this loan? A. $50,000.

Q. Now, what period or periods were these — Strike that, please. In what amount were these payments to be made to the contractor? A. One was in the amount of $15,280.78; two at $12,498.75; and a final one of $9,721.72.

Q. Well, have these installments been paid out already, Mr. Mitchell? [62] A. The first three have; the final one of $9,721.72 has not been paid up to this point.

Q. Was this total sum of $50,000 to have been paid in four installments? Is that correct? A. That is correct.

Q. Now, you say three have been paid. A. Three have been paid, that is correct.

Q. What were the amounts of those three? A. Fifteen thousand —

Q. No, I am sorry. I mean each individual installment. A. $15,280.78 — Do you want the date, is that it?

Q. Yes. What were the dates of the installments? A. October 28th of 1963 was the first one.

Q. And that was in the amount of what? A. $15,280.78.

Q. And what was the amount of the next installment and the date? A. November 21st of 1963, $12,498.75.

Q. And what was the date of the third installment? A. $12,498.75, December 19, 1963, was the date it was approved and paid on December 20th.

THE COURT: The second and third are in the same amount?

THE WITNESS: That is correct.

[63] BY MR. COOKE:

Q. Now, Mr. Mitchell, would you look at your installment for October and see if your figure is as you have stated. A. I might explain that. Out of the $15,280.78, I believe some expenses were paid at that particular time which may not have gone to Mr. Wade. That is probably what you have reference to.

Q. Yes. I am interested in knowing what was paid to the contractor, Mr. Wade. A. $12,498.75.

Q. Now, isn't it true that each of the installments consisted of similar amounts? A. That is correct, yes.

Q. Now, do you have those approval statements with you? A. Yes, I do.

Q. May I see them, please? A. Would you like for me to detach this?

Q. Yes, please. A. (Witness complied.) One, two and three.

(Slips were handed to counsel by the witness.)

MR. COOKE: Thank you. May the three approval slips be marked as plaintiff's next exhibit?

THE COURT: Yes, they may.

[64] THE DEPUTY CLERK: Plaintiff's No. 6 for identification.

(Three approval slips were marked Plaintiff's Exhibit No. 6 for identification.)

(Exhibit was shown to opposing counsel.)

BY MR. COOKE:

Q. Mr. Mitchell, is it true that each of these statements represent a sum of $12,498.75 paid to the contractor, Mr. Wade? A. That is correct, yes, sir.

Q. These are the statements which were submitted to you by Mr. Archer, the architect; is that correct? A. That is correct.

[64] Q. Now, Mr. Mitchell, was there an arrangement between you and the defendants as to the conditions precedent to paying out any money to the contractor? A. There was an arrangement whereby the amounts would be paid out as the work progressed.

Q. Do you have an agreement to that effect or a statement to that effect? A. (Perusing papers) We sent out a letter to Dr. Walker, dated May 23, 1963, stating the conditions under which we had approved our loan to him.

[65] Q. What were the conditions with respect to an architect's approval? A. Well, one of the conditions was that a schedule of draws for the contractor was to be submitted to the bank and that each draw be approved by Mr. Archer at the borrower's expense.

Q. Now, this approval would be an approval that the work had progressed as required under the contract, is that correct? A. That the work had progressed according to the contract and that a sufficient value was there as a result of the work for this amount to be drawn.

Q. Now, did the defendants approve or accept this arrangement? A. Yes, they did.

Q. Do you have that paper with you? A. Yes, I do.

Q. May I see it, please?

(Document was handed to counsel by the witness.)

MR. COOKE: May this be marked as Plaintiff's Exhibit No. 7?

THE DEPUTY CLERK: Plaintiff's No. 7 for identification.

(Letter was marked Plaintiff's Exhibit No. 7 for identification.)

[66] (Exhibit was shown to opposing counsel.)

BY MR. COOKE:

Q. Now, Mr. Mitchell, did there come a time when it was necessary — Strike that, please. Mr. Mitchell, did you require a note se-

cured by deed of trust from the defendants as a prerequisite for consummation of this loan? A. Yes, we required that a mortgage be taken on the property itself. The indebtedness would be evidenced by a note secured by a deed of trust.

Q. Do you have that note and deed of trust with you? A. No, I didn't bring the note. I have the deed of trust but the note is in the bank's files.

Q. Would you relate the terms of the deed of trust in brief? A. This deed of trust is dated October 28th, 1963, to secure a note of $50,000 payable $400 a month, with the first payment starting January 28th, 1964, balance if any becoming due and payable October 28, 1973.

Q. Was that deed of trust signed by the defendants, Mr. and Mrs. Walker? A. Signed by Claude Gilmore Walker and Maude Josephine Walker.

Q. May I see it, please?

[67] (Document was handed to counsel by the witness.)

MR. COOKE: May this be marked as Plaintiff's Exhibit No. 8 for identification?

THE DEPUTY CLERK: Plaintiff's No. 8 for identification.

(Deed of trust was marked Plaintiff's Exhibit No. 8 for identification.)

BY MR. COOKE:

Q. Now, Mr. Mitchell, you have testified and offered approvals by the architect, Mr. Archer, for three installments. Did there come a time when a request was made for the final installment by the contractor, Mr. Wade?

A. I have a statement dated February 17, 1964, signed by Mr. Wade, requesting final payment upon completion of the job according to plans and specifications, $12,498.75.

Q. That was a request for the fourth and final installment, is that correct? A. That is correct.

Q. Now, was this request signed by the defendant? Does his name

appear? A. No, it does not.

Q. On the request itself, do you find his name on that paper, the defendant Dr. Walker? [68] A. No, it is addressed to Dr. Walker.

Q. Do you find Dr. Walker's signature below the request? A. There is a signature on this sheet down at the bottom, "Claude G. Walker, M. D."

Q. May I see that, please?

(Document was handed to counsel by the witness.)

MR. COOKE: May this be marked as Plaintiff's Exhibit No. 9 for identification?

THE DEPUTY CLERK: Plaintiff's No. 9 for identification.

(Request for payment was marked Plaintiff's Exhibit No. 9 for identification.)

(Exhibit shown to opposing counsel.)

BY MR. COOKE:

Q. Now, Mr. Mitchell, did the architect submit an approval for the final draw on behalf of the plaintiff, Mr. Wade? A. Yes, he did.

Q. And when was that? A. It is dated February 18, 1964, $12,498.75.

Q. That was for the final payment? A. It is marked on here "final payment."

[69] Q. May I see that, please?

(Document was handed to counsel by the witness.)

MR. COOKE: May this paper be marked Plaintiff's Exhibit No. 10 for identification?

THE DEPUTY CLERK: Plaintiff's No. 10 for identification.

(Request for draw for last payment was marked Plaintiff's Exhibit No. 10 for identification.)

(Document was shown to opposing counsel.)

THE WITNESS: May I make a correction of an earlier statement?

MR. COOKE: Yes.

THE WITNESS: On November 1st, 1963, I gave you a figure originally $15,280.78 and stated that the difference between $12,498.75 was paid to Mr. Wade and this figure was for expenses. Actually, this was the amount paid to the building and loan association that held the mortgage on the property at that time. The amount was $2,782.03, and the figures are on this sheet, this settlement sheet. I wanted that to be clear. They were not expenses.

BY MR. COOKE:

Q. Very well. In other words, the only amount which was paid to Mr. Wade pursuant to the approval statement was $12,498.75, is that correct? [70] A. That is correct, and the difference amounts to the balance on the property held by the building association.

Q. I see. Now, Mr. Mitchell, you received approval statements from the architect, Mr. Archer. Now, this architect was agreed upon by the defendants as well as yourself to do the inspecting and pass upon the progress of work, was he not?

MR. FAUNTLEROY: I object, Your Honor, to the counsel leading the witness and testifying.

THE COURT: Reframe the question. The information is relevant but reframe the question.

BY MR. COOKE:

Q. Did you and the defendants agree voluntarily to use Mr. Archer, the architect, to approve all advances paid out, all draws for the defendant by the plaintiff? A. Yes, in the approval which was agreed to by Dr. Walker and his wife, dated May 23, 1963, which I believe you already have.

Q. Now, did Dr. Walker or Mrs. Walker ever request that any other architect also pass upon this work prior to payment? A. Not to my knowledge.

Q. To your knowledge, did the defendant, Mr. Walker, ever object to any payments made to the contractor prior to the last one, prior to the fourth draw? [71] A. I have no recollection of it.

Q. Now, Mr.Mitchell, what is the total amount already paid to the plaintiff pursuant to this agreement or this work contract? A. If I am not mistaken, it was $37,496.25.

Q. Thank you. Now, Mr. Mitchell, to your knowledge had not the plaintiff commenced work on the premises at 3103 Georgia Avenue prior to the date of the first draw?

MR. FAUNTLEROY: I think the question, Your Honor, should be rephrased as to whether or not he knows.

MR. COOKE: I will withdraw that question.

BY MR. COOKE:

Q. Mr. Mitchell, if you know, had the contractor commenced work at 3103 Georgia Avenue prior to the time that the deed of trust that you have just produced was executed? A. I would presume so. I say I presume —

MR. FAUNTLEROY: I don't think, Your Honor, that answer is responsive. The question is whether he knows.

THE COURT: Do you know?

THE WITNESS: No, I don't know.

BY MR. COOKE:

Q. Mr. Mitchell, do you know when the first request by the contractor was made for payment? [72] A. October 28th, 1963.

Q. I mean request from the plaintiff. Did he make a request of you prior to October? A. The first request for payment from the plaintiff that I know about was October 28, 1963.

Q. I see.

MR. COOKE: Your Honor, may it please the Court, I move that Plaintiff's Exhibits Nos. 6 through 10 be admitted into evidence.

THE COURT: Is there any objection?

MR. FAUNTLEROY: I have an objection to some of them. I can indicate which documents we have no objection to, if Your Honor cares. We have no objection to Plaintiff's Exhibit No. 7.

THE COURT: No. 7 will be admitted.

(Plaintiff's Exhibit No. 7 for identification was received in evidence.)

MR. FAUNTLEROY: No. 8.

THE COURT: No. 8 will be admitted.

(Plaintiff's Exhibit No. 8 for identification was received in evidence.)

MR. FAUNTLEROY: And I will check with the defendant to see whether he acknowledges his signature on this exhibit.

[73] (Counsel conferred privately with the defendant.)

MR. FAUNTLEROY: We will agree to Plaintiff's Exhibit No. 9, Your Honor.

THE COURT: No. 9 is admitted in evidence.

THE DEPUTY CLERK: Plaintiff's Exhibit No. 9 in evidence.

(Plaintiff's Exhibit No. 9 for identification was received in evidence.)

THE COURT: What happened to No. 6?

MR. FAUNTLEROY: No. 6 and 10, Your Honor, the authorization statements signed by Mr. Archer, who was the bank's architect, it's not the architect that is bound by the contract here. This was a condition precedent to getting a loan by the Industrial Bank. I understood that Mr. Archer is out in the hall to testify as a witness. If he can identify these authorizations and the reason why he authorized these requests, I think that would be the proper way to do it.

THE COURT: These are records kept in the regular course of business by the bank in connection with this loan, are they not?

MR. FAUNTLEROY: Yes, I agree with that, Your Honor.

THE COURT: They will be admitted.

THE DEPUTY CLERK: Plaintiff's Nos. 6 and 10 marked for identification, in evidence.

[74] (Plaintiff's Exhibits Nos. 6 and 10 for identification were received in evidence.)

BY MR. COOKE:

Q. Now, Mr. Mitchell, to your knowledge has the plaintiff ever been paid the final installment of $12,498.75? A. Not to my knowledge.

Q. And had he been paid, it would have been paid through your bank, would it not?

MR. FAUNTLEROY: I object to that question, if Your Honor please. That was a loan. It could have been paid otherwise and he wouldn't know anything about it.

THE COURT: That calls for a conclusion. He can't answer that.

MR. COOKE: May I reframe my question?

THE COURT: Yes.

BY MR. COOKE:

Q. Has your bank paid the final installment of $12,498.75 to Mr. Wade? A. No, we have not.

Q. Were you at some time in the past requested not to pay this money by the defendant? A. Yes, we were requested not to pay it.

Q. Was that request made after the date of February 17, 1964? [75] A. Yes, it was.

Q. It was after the request which you have just produced was made by Mr. Wade and signed by Mr. Walker, is that correct, which is Plaintiff's Exhibit No. 9? (Exhibit shown to the witness.)

The defendant had stopped payment after that date, is that correct? A. That is correct.

MR. COOKE: Thank you.

* * *

CROSS EXAMINATION

BY MR. FAUNTLEROY:

Q. Now, Mr. Mitchell, I show you what has been described as Plaintiff's No. 7, which is a letter dated May 23, 1963, from the Industrial Bank of Washington which is signed by you, and lists approximately seven conditions to the receiving of this loan that you told us about. Now, those seven conditions that you have there listed in that

letter are conditions you exacted before you would make this loan to Dr. Walker, is that correct? A. That is correct.

Q. And those conditions there,there was no intention to interfere or modify the contract already existing between Dr. Walker and Mr. Wade? [76] A. I would say no to that because we were not particularly concerned about the contract itself; we were concerned about the conditions under which we would make the loan.

Q. And you were interested in protecting the bank insofar as the bank getting value for its money, is that correct? A. That is correct.

* * *

Q. Now, I understand that you received, Mr. Mitchell, [77] a telegram from Dr. Walker. What was the date of that telegram stating to hold up any final draw to Mr. Wade? A. The date of the telegram is February 23rd, 1964. We received it on February 24th.

Q. And pursuant to that telegram, you proceeded to hold up the final draw, is that correct? A. That is correct.

* * *

* * *

REDIRECT EXAMINATION

BY MR. COOKE:

Q. Mr. Mitchell, at the time that you set forth the conditions which counsel just alluded to which I believe is Plaintiff's Exhibit No. 7, there was not a contract existing between the plaintiff and the defendant for the work to be done, was there? A. I do not know.

Q. These conditions were set forth if the defendant chose to borrow this money for this work, is that correct? A. That is correct.

* * *

[78] Q. Did the defendant ever request that he approve the final draw? A. I can't recall any such request.

Q. Did the defendant ever request that he approve any of the previous draws, if you know? A. I have no knowledge of any request that he approve any of the previous draws because it was my understanding

that Mr. Archer's approval would protect both the owner of the property and the bank.

Q. And the defendants accepted Mr. Archer for that purpose, did they not? A. They did.

* * *

[79] R. C. ARCHER, JR.

* * *

DIRECT EXAMINATION

BY MR. COOKE:

Q. Now, Mr. Archer, would you state your full name and occupation, please? A. Romulous C. Archer, Jr., registered architect, practicing in the District of Columbia.

Q. Mr. Archer, do you know the defendants, Dr. and Mrs. Claude Walker? A. I know Dr. Walker. I haven't met Mrs. Walker.

Q. On what occasion did you meet Dr. Walker? [80] A. Well, some years ago, I made some plans for him for a building that he is now discussing. It has been about five years ago.

Q. Have you had more recent dealings with Dr. Walker? A. Yes, sir.

Q. And would you relate in what capacity you served? A. I was checking for the Industrial Bank. The Industrial Bank made a loan for the construction and alteration of this building for Dr. Walker, and my job was to check the building so he could get his payments.

Q. Do you know who the contractor was on this job? A. Yes, sir.

Q. Would you state his name, please? A. Mr. Wade.

Q. Wade? A. Wade, yes, sir.

Q. Now, do you know what work Mr. Wade was to perform for Dr. Walker? A. Well, he was to build an addition to this building and make some extensive alterations and repairs.

Q. Are you familiar with the contract price? A. Yes, sir.

Q. What was that contract price? A. (Referring to a document.) $49,995.00.

[81] Q. Now, where were the premises on which this work was to be done? A. 3103 Georgia Avenue, Northwest.

Q. Now, how was Mr. Wade to be paid and under what conditions and circumstances was he to be paid? A. He was to be paid, according to the contract, in four payments; three payments while the work was under construction and the final payment at the completion.

Q. Now, what was your duty with regard to these payments? A. My duty was to check the job and issue a certificate for the payment if the amount of work was done that the contract called for.

Q. Now, did you issue such certificates? A. I did.

Q. How many such certificates did you issue? A. Four.

Q. You issued the fourth one. Did the fourth one represent completion of the work? A. The fourth one -- yes, sir.

Q. Now, Mr. Archer, were you accepted to perform these duties by both Mr. Mitchell of the Industrial Bank and the defendants, Dr. and Mrs. Walker? A. No, sir, by the Industrial Bank.

[82] Q. Did Dr. Walker agree with your performing this task? A. He didn't make any objection.

Q. I see. Mr. Archer, I show you these papers and ask you if you are the author of those papers? A. (Perusing documents.)

THE COURT: Would you identify them for the record by number?

MR. COOKE: These are Plaintiff's Exhibit No. 10 and Plaintiff's Exhibit No. 6, which are in evidence.

THE WITNESS: Yes, sir. I identify them as my certificates.

BY MR. COOKE:

Q. Now, prior to submitting these statements, you made an inspection of the premises at 3103 Georgia Avenue, is that correct? A. Yes, sir.

Q. Upon your inspection, did you find that the contractor had complied with the terms of the contract, the plans and specifications? A. Yes, sir.

* * *

CROSS-EXAMINATION

[82] BY MR. FAUNTLEROY:

Q. Mr. Archer, I understand you have been a practicing architect for some time, is that correct? [83] A. That is correct.

Q. How long have you been a registered architect? A. Around 40 years.

Q. Have all of those years been practicing in the District of Columbia? A. Correct, sir.

Q. And if you don't mind, what is your age now, sir? A. My age?

Q. Yes, sir. A. Seventy-five.

[83] Q. Now, you told us, Mr. Archer, about inspections that you made on the premises. Do you have any notes or indications as to what dates you made inspection of the premises? A. Yes, sir.

Q. Will you give us those dates, please? A. The first inspection was around October 28, maybe it was the 27th; the second inspection was November 21st, 1963; and the third inspection was December 19th, 1963; and the fourth inspection was February 19, 1964.

Q. Now, did you make any inspection since February 19th, 1964? A. Since then?

Q. Yes.

[84] A. Yes, sir.

Q. Will you give us the dates of the inspections subsequent to February the 19th, 1964? A. Since then?

Q. Yes. A. I don't have the dates with me. I was there about a month ago or a month and a half ago.

Q. Then I take it that you made an inspection approximately in April or May of 1965. Would that be correct? A. That is right.

Q. Approximately. A. Approximately, yes.

Q. So you made the four inspections as you have indicated and you made another inspection in April or May of 1965. Now, were those —

MR. COOKE: If it please the Court, I think the witness has testified he was not clear on the date. I think counsel is placing a date where the witness has said —

THE COURT: He gave him an approximate date of a month or two ago.

BY MR. FAUNTLEROY:

Q. I take it, you made five inspections of the premises, is that correct, sir? A. I made a recent inspection, I would say about a month and a half ago; that would be five, yes.

[85] Q. Now, with reference to the last inspection that you made on the premises — I will strike that. Did you make any notes of your inspections when you made any of the first four inspections? A. Repeat that, please.

Q. Did you make any notes as to the progress of the work or what was done or what hadn't been done in any of the first four inspections you made? A. Oh, yes. Each time I made an inspection, I made notes of it in regard to -- so I could make the certificate of payment.

Q. Do you have those notes with you, sir? A. No, sir.

Q. Where are they? A. I don't know whether I have them in my files or not. When I did make an inspection prior to giving them the order for payment, why, as a rule, I never keep those notes.

Q. In other words, I take it, then, that you threw the notes away or misplaced them? A. I am not certain whether I threw them away or not, but as a rule I make notes to the point so I can issue a certificate.

Q. Now, directing your attention to the fourth certificate that you made for the final draw, for which I [86] understand inspection was made February 19th, 1964, did you note any work that was incomplete?

A. Yes, sir.

Q. You did. Will you tell us what work that was, sir? A. I can't recall it just now, but I do remember telling Mr. Wade some things that he would have to do and he agreed that he would do them.

Q. Can you tell us what those items were that you told him to do? A. Some painting wasn't done, some tile work that wasn't done and one or two other items. We got in touch with Dr. Walker and we had a conference and we agreed that the amount of extra work was much more than the amount of work that had been done.

Q. We are speaking of the work now that he was to perform under the contract; we are not speaking of the contract work. I am trying to find out from you just what items that you noted at that time that were supposed to have been done under the regular contract price which were not done. A. Items that were not done?

Q. Yes, that should have been done under the contract. A. Those are the ones that I just named.

Q. That is painting to be done. Do you know whether this painting was to be done or whether it was done incorrectly? [87] A. I don't remember just now, sir.

Q. Now, how about the tile work? Will you tell us, if you can remember, what you told him to do about the tile work? A. Just some patch work in the tile.

Q. Now, can you think of anything else that you might have told Mr. Wade to do? A. I can't think of anything just now, no, sir.

Q. Do you know whether or not you made any written note of things to be done or whether you gave him any written indication of what he was supposed to do to complete the job? A. No, sir.

Q. Now, the tile work you have told us about, can you tell where that work was supposed to be done? A. In the bathrooms.

Q. Any place else? A. I can't recall anywhere else, no, sir.

Q. Now, did you notice on this fourth inspection, Mr. Archer, just as you come into the building, the tile is sort of uneven and pulled --

[87] MR. COOKE: I object, if Your Honor please. It seems counsel is testifying himself.

THE COURT: Well, this is cross-examination.

BY MR. FAUNTLEROY:

[88] Q. Did you notice, sir,any tile that had been pulled away from each other or was uneven in the front entrance of the building? A. On the recent inspection, we checked that there was some deficiencies and it seems most of them were from people walking on the floor and using the building.

THE COURT: You said the recent inspection?

THE WITNESS: Yes.

THE COURT: His question was directed to the fourth inspection for the final payment.

BY MR. FAUNTLEROY:

Q. February 19th, 1964. A. I don't remember that, I am sorry.

Q. Now, do you remember, Mr. Archer, a discussion about a wall in the basement of this building, the left side of the building as you go all the way back, not being furred so that there were powder marks on the wall indicating that the elements, the weather, was going through the building or going through the wall? Did you notice that? A. I can't recall this now.

Q. Now do you remember, sir, the basement floor of the building, do you recall that it is uneven? A. No, I don't recall that but we did make a list. You are talking about before the payment?

[89] Q. Yes. A. No, I don't recall any.

Q. You don't recall so you don't know whether it existed or not, is that correct? A. Not in full payment; no, sir.

Q. Now, did you make an inspection of the outside of the building on this fourth draw in the back? A. I don't recall that either.

Q. I will ask you this question: Did you make an inspection of the first floor of the building on February 19, 1964? A. Yes,sir.

Q. Did you notice any deficiencies on that floor? A. I made a list of the deficiencies but I don't have that copy with me now.

Q. Did you give that list of deficiencies to Mr. Wade? A. Yes, sir.

Q. Can you recall any items that were on that list of deficiencies? A. I cannot unless I see the list. No, sir, I can't.

Q. Did you make an inspection of the second floor of the building on February the 19th, 1964? That is the fourth draw, sir; the time you certified the fourth draw for payment. A. At that time, I went through the entire building and I don't recall the items just now.

[90] Q. Do you know whether you made a list of deficiencies on the second floor of the building for Mr. Wade to correct? A. No, sir, I don't remember that.

Q. Now, you were employed by the bank to render this service, is that correct, Mr. Archer? A. That is right.

Q. And you knew that Mr. Giles was the architect for the defendants in this case, didn't you? A. That is correct.

Q. Now, if I understand you correctly, sir, you told me that you made the fourth inspection of the premises on February 19, 1964; is that correct? A. That is correct.

Q. Now can you tell us, sir, why on the day before, February the 18th, you made a certification for the final draw before inspecting the premises? I am referring now to Plaintiff's Exhibit No. 10. If you will notice the date on Plaintiff's Exhibit No. 10, it is dated February 18, 1964, the day before you made the final inspection. A. What was the question, sir?

Q. Will you tell us what date the certificate is dated for the final draw? A. It is dated February 18, 1964.

Q. And you have told us that you made the final [91] inspection on February the 19th, 1964, which is the next day. Can you tell us why you authorized the payment of the final draw the day before you made the final inspection? A. Well, if I said that, I made an error. This

is February the 18th and I certainly made the inspection before, which would have been the 17th or it could have been the 16th.

Q. Well, you told us that you made that fourth inspection on February the 19th, 1964. Did you have any note at hand as to that date? A. Any notes at hand, no, sir.

Q. Now, did you prepare the certificate for the final draw? Did you prepare it, sir? A. Yes, sir.

Q. And did you also draw that space for the signature of the owners to consent to this draw? A. (Perusing exhibit) The signature?

Q. There is a space near the bottom of that certificate, Mr. Archer, for the approval of the owners. Did you do that? A. Yes, sir.

Q. Is that a customary practice of yours? A. On the last payment, yes, sir.

Q. For the final draw? A. Yes, sir.

* * *

[92] REDIRECT EXAMINATION

BY MR. COOKE:

* * *

[93] Q. I see. Now, Mr. Archer, you have testified you do not recall certain matters which counsel questioned you about. May I ask, during your inspection for the fourth approval, did you find any major defects in the work done by the contractor? Do you understand my question? A. I think I do. The owner and the builder got together, we got together and I asked the owner if he was satisfied with the work and we talked a while, and then both of them agreed that some work still had to be done to fulfill the contract but the extra work would be much more than the cost of the deficiencies, so I left them with the understanding that they would agree and sign the approval of the certificate. However, I am almost certain I told them at that time that he would have to submit a release lien from the contractor for that material.

* * *

[97] CLAUDE G. WALKER

* * *

DIRECT EXAMINATION

BY MR. FAUNTLEROY:

Q. For the record, will you state your full name, sir? A. Claude Gilmore Walker, M. D.

Q. Do you have offices in the District of Columbia? A. Yes, 3103 Georgia Avenue, Northwest.

Q. That is in the District of Columbia? A. In the District of Columbia.

Q. Is that the building about the discussion is all about today? A. Yes, the Community Medical Dental Building.

Q. And the work that the contract called for was work to be performed on that building, is that correct? [98] A. Yes.

* * *

Q. Did you make any complaints directly to Mr. Wade? A. Yes.

* * *

[99] Q. Were there any defects in the building on February 18th, 1964? [100] A. Yes.

* * *

Q. Will you tell us what conditions you observed on February the 18th, 1964? A. Yes. Absence of tile at the entrance of the building, this includes the stairwell. Absence of tile on the floor.

Unfinished wall to the left in the stairwell, in the basement.

Q. Now, when you come off the street, is there a pair of steps going down into the basement to your office? A. Yes. The floor there is not level. It wasn't [101] brought up properly. There is an improper step, the last step going down to the basement.

* * *

Q. Tell us what the condition is now, Dr. Walker. A. Well, the plaster is falling from under the stairs in the stairwell.

There is paint over plaster on the metal work of the stairs in the stairwell.

Those are the essential defects. Of course, there are irregularities in the tile on the steps in the stairwell.

* * *

[102] Q. Have you noticed any other conditions about the building which you have complained to Mr. Wade about in the basement? A. The floor is unlevel throughout. The concrete floor is unlevel throughout.

Q. What does this cause? A. I beg your pardon?

Q. What happens? The floor being unlevel, what does this mean? A. Well, it's wavy. There are sinks in it in every room, every treatment room, in the waiting room. Now, there is tile on the floor which is very irregular.

Q. Where is this tile you speak about? A. Tile throughout the basement. Walls in certain areas are not plumb in certain areas.

MR. COOKE: I didn't understand.

THE WITNESS: The walls aren't plumb.

Corners aren't square. There is missing pieces of tile in one of the toilets in the basement.

On the wall on the left in the rear of the building, there are powder marks in one section.

THE COURT: Excuse me, Doctor, you are talking in the present tense. Are you referring now back to February of 1964 or are you referring to present conditions?

[103] THE WITNESS: Well, we will say then.

MR. FAUNTLEROY: If I might interject my question was directed to February the 18th, 1964.

THE COURT: He is talking as though he is talking of conditions as of today.

THE WITNESS: They existed then.

BY MR. FAUNTLEROY:

Q. Well, will you confine your answer to February 18th, 1964. A. There were powder marks on the north wall, the rear portion of the basement.

There is insufficient painting throughout on the walls and the doors.

There are doors which are not hung properly. I can close the door and light will come through from within the room at the top of the doors.

There is a broken marble sill -- there was a broken marble sill on this date in the suite that I occupy.

In the back part of the building, it appears to me that the level of the concrete floor wasn't brought up as it should have been. This has been partially covered over by plastic molding.

In the back of the building where there is a toilet, there is a door which goes to the toilet which is narrower at the bottom than it is at the top.

[104] And there is a door leading to one of the treatment rooms from the waiting room which at that time wouldn't close because of unlevelness of the floor, which has since been cut.

In the ceiling, which is a suspended type ceiling, there was at this time -- well, at this inspection, the ceiling which was in at that time was of a type which had not been approved by the District inspectors.

THE COURT: How do you know that?

THE WITNESS: Subsequently, the whole ceiling was removed by order from down town, by order of the inspector from down town.

BY MR. FAUNTLEROY:

Q. Now, you have told us about the conditions you have observed on the basement. Are those all the conditions? A. Those are the major defects in the basement.

Q. Now, will you tell us what conditions you observed -- A. Just one other thing: At that time there was a valve in the sink of the first waiting room which was defective in reference to letting the water out of the sink.

In some places, in reference to the plumbing, there were left off

little finishing touches like the collars around the pipes coming out of the walls, in several places.

Also, the ceiling of the utility room was never completed.

[105] Q. Where is this utility room you speak of? A. The utility room is in the basement just prior to the area in the back which is one step down to the right. There is no ceiling in that utility room at all, and the floor slants down from the entrance of the utility room into the hallway.

* * *

Q. You may proceed. A. I didn't mention, too, that there was really deficient -- well, each room where these sinks were supposed to be, not the proper type of sink was in as was in the contract, the specifications.

You asked me to go to the second floor?

Q. The first floor. [106] A. The first floor, I consider that was excessive undercut of the door leading to the waiting room of the first floor.

Q. What do you mean by "excessive undercut"? A. There was an excessive space between the bottom of the door and the sill. Again we had doors in different places which didn't fit properly. For example, in the entrance to the treatment room. In one of the treatment rooms now, there is no --

THE COURT: Let's limit your testimony to February 18th when you made the inspection.

THE WITNESS: At that time, yes. Well, at that time there was no hot water coming through one of the hot water faucets in one of the treatment rooms.

BY MR. FAUNTLEROY:

Q. Has that condition subsequently been corrected? A. No.

In the consultation room, the pediatric section, the paneling on the walls is incomplete all around at the top.

Q. Where is that room located? A. It is located in the rear of

the building, south. It would be the extreme rear south.

Q. Can you describe it for us a little more in detail? You say it is incomplete. [107] A. Yes. Well, approximately four inches down from the plane of the ceiling, there were little pieces filled in around to complete the paneling.

Q. Now, you heard Mr. Wade take the stand and he said that there was only one panel where it was split in this part. Was that correct? A. No, it is all around the periphery.

Q. Very well. You may proceed. A. On this level, there is no caulking in the back around the windows.

Q. Will you describe that a little more in detail? A. Yes, the windows fit in masonry and there are cracks between the masonry and the windows which have not been filled in, have not been caulked. On the inside, air could be felt coming through at that time.

Q. Is that only on the first floor? A. I believe so. I believe the windows were caulked on the top floor.

Those were the essential things I can recall right now with respect to that floor.

There are insufficient painting at that time on the doors and the walls in the treatment rooms.

Q. Will you tell us now, then, about the second floor, which I belive is your top floor? [108] A. Yes, the top floor.

Insufficient painting, what I considered at that time an excessive undercut of the entrance door to the waiting room. And the same thing with reference to the sinks where they were to be placed was not the type of sink in there which was specified in the contract and specifications.

Q. Is that essentially the conditions you observed on February the 18th, 1964? A. Yes, and also -- this is a general statement in reference to the whole building, the doors and in reference to the panels which were in the contract and the windows which were included with the panels, they weren't there either.

THE COURT: The panels weren't there?

THE WITNESS: The Thinlite panels which were originally in the contract weren't there at that time.

BY MR. FAUNTLEROY:

Q. Well, we will get to that. That's the paneling you are referring to? A. Yes.

Q. Now, will you tell us, Dr. Walker -- you heard the testimony of Mr. Wade to the effect that the reason he didn't fur the wall in that basement area was because there was a garage attached to that wall at the time he started work on your building. Is that correct? [109] A. There was no garage there at all when he started work on the building. I think we can get testimony to corroborate my statement.

Q. He mentioned that there was a garage attached to that wall and that it was torn down during the course of remodeling of your building. A. It was not. That garage was torn down in either 1961 or 1962. I can't recall exactly.

Q. Was that before your -- A. Before.

Q. Now, with reference to the glass Thinlite panels that were called for by the plans and specifications, did you have any discussion with Mr. Wade about the installation of the panels from the Hires Turner Glass Company? A. The statement was that Hires Turner had goofed.

Q. Who told you that? A. Mr. Wade.

Q. Did he explain what he meant by "goofed"? A. They didn't put the order in for the panels and the glass which join in with the panels, the glass windows which join in with the panels.

Q. Did he give you any excuse as to why he did not install the glass that was called for by the plans and specifications? [110] A. The order wasn't honored by Hires Turner.

Q. Did he say why he couldn't install it? A. He couldn't get an order from Hires Turner. He couldn't get a delivery from Hires Turner.

Q. Did he explain why he couldn't get a delivery from Hires Turner? A. He said they defaulted on it. They simply had defaulted on it, that's the explanation I had.

Q. Who had defaulted? A. Hires Turner on the glass and he said also that he was apprised that Mr. Good, the bondsman, was very surprised that he goofed on the order because of the business he had sent to Hires Turner.

Q. As a result of that conversation, did you and Mr. Wade make any further agreement? A. I was quite upset by this thing now, that I had expected that these panels would have been in in November and there was always this coming of the panels and these windows. So I sent a telegram to Gimbel Glass Company, a subsidiary company for Libbey-Owens-Ford Glass Company, in Toledo, Ohio, asking them to expedite the order. Subsequently I received a telegram saying that they had received no order.

So I further inquired by telegram of Hires Turner as to what the situation was. I wanted to know why, and in response to this telegram, I received a letter from them [111] explaining.

* * *

[112] Q. Now, who decided to install this type of window in your building? A. I decided that they would be installed. The building was built up around these particular panels from way back in 1958.

* * *

Q. Now, going back just a little further to November of 1963, I think you told us the cold weather was approaching and these panels hadn't been installed; is that correct? A. No, they hadn't. I had expected they would be in before the onset of winter and it could have been done.

Q. What happened when they did not arrive? [113] A. Well, when I became aware that the order had not been processed through Hires Turner and that there would be this delay, possibly into Febru-

ary for inclosure with these panels -- when I became aware of that, I became a little panicky. So I got in contact with Mr. Giles, the architect of the building, and I told him what had happened and I told him that I knew of Pittsburgh Glass which he knew, of course, being an architect and that I would seek a comparable substitute at Pittsburgh Glass for these panels, meaning that they would be of such a nature that the sun, the rays of the sun would be screened out. So that evening, I went to Pittsburgh Glass and told them what the story was. I wanted to know what they had whereby a satisfactory substitute could be made and over there, I saw what I wanted as a substitute. My intentions were to relay this information to Mr. Wade. Before I could relay this information -- I might say also I saw another type of block, a cork Intaglio which I thought would be sufficient in some areas to substitute for this suncreening type of glass.

Before I got in contact with Mr. Wade, the next day there were delivered a different type then I had in my mind that should be used, a Decora block, which incidentally is not ever to be used on a sun side because it will let in too much sun.

[114] Now, in order to expedite things, I decided that we could go along with this type of Decora block in trying to facilitate things because it was required that it be closed in before winter but I had it in my mind that I would not under any circumstances allow these Decora blocks to go in on a sun side, particularly in the pediatric section. So I balked on their use in the back and I was then informed that these blocks which had been delivered could not be returned.

Q. You were informed by whom? A. Mr. Wade, that they could not be returned.

Subsequently, I wrote a letter and this was directed to the bondsman, Mr. Good. It was a six-page letter and I took this letter with my brother-in-law, Joseph Street, to his office in Bladensburg near Peace Cross at the Suburban Lumberteria, and in general I stated in this letter that I did not want the situation to be compounded --

* * *

[117] Q. Did there come a time when you did arrange to have glass installed? A. Subsequently this sun-screen glass did come.

Q. Who ordered it? A. Mr. Wade ordered it.

Q. Did you agree to this glass being ordered?

* * *

Q. I show you what has been marked at pre-trial as Defendants' Exhibit No. 1 and I will ask the clerk to mark it for identification as Defendants' Exhibit No. 7.

THE DEPUTY CLERK: Defendants' No. 7 for identification.

[118] (Letter was marked Defendants' Exhibit No. 7 for identification.)

(Document was shown to opposing counsel.)

BY MR. FAUNTLEROY:

Q. I show you what has been marked as Defendants' Exhibit No. 7 for identification and ask you if you can identify it? A. Yes, I can identify it. This is a copy of the letter I received from Hires Turner Glass Company.

Q. And the date of that is when? A. March 2nd, 1964.

* * *

[120] MR. COOKE: I don't think the letter states that. The letter shows there was something further to be done. This letter merely shows that at the time they wrote this letter dated March 2 of 1954, the entire job had been completed. Mr. Wade's contract with the Hires Turner Glass Company was some time in September of 1963.

* * *

THE COURT: This is after the job was completed?

MR. FAUNTLEROY: Yes, Your Honor, this is after the job. This is after the substitution had been made but this is the glass that Dr. Walker originally wanted installed on his building.

THE COURT: Subject to an order from some agent who [121] isn't

identified, saying that the funds were available.

* * *

[122] Q. I show you what has been marked as Plaintiff's Exhibit No. 4 which has been introduced into evidence. Other than Items 9 and 14 that are listed on this exhibit, did you ever authorize the extras that were enumerated in this exhibit? A. (Perusing exhibit) Some of these were authorized under certain conditions. There was nothing authorized in writing.

Q. Other than 9 and 14, will you tell us what if any were authorized under certain conditions? [123] A. Now, other than 9 and 14 -- No. 1, completion bond to Suburban Lumber Company. If it conflicted with what was in the plans and specifications, there was no authorization.

Q. I am not talking about that now, Doctor. Did you authorize it? A. I wanted a completion bond. I will say yes, I authorized it.

Q. Did you authorize any other items on that list with exception of the completion bond and Items 9 and 14? A. I don't recall authorizing a lawyer's fee for a deed of trust.

Q. Just look down the list, Doctor, and tell us whether you authorized any other items on the list other than Items 1, 9 and 14. A. I authorized No. 3, metal door bucks for all interior doors. But this was incident to using what we had there. There were some bucks there which weren't used.

THE COURT: But you did authorize Item 3?

THE WITNESS: Yes, but we were supposed to be compensated for what was there.

MR. COOK: What is that?

MR. FAUNTLEROY: Item 3, metal door bucks for all interior doors.

BY MR. FAUNTLEROY:

[124] Q. With reference to the bucks that were already there, was there to be a credit allowed for those? A. A credit was to be al-

lowed. I assumed that on the basis of the plans and specifications.

Q. Did you ever discuss with Mr. Wade credit for that item? A. I did.

Q. What was the result of this conversation? A. I assumed that he was going to give me credit for them. It never came about, I don't believe.

Q. So in other words, you accept Item 3 on this list with some credit; is that correct? A. Yes, sir.

Q. Now, do you see any other item on the claim for extras which you in effect authorized either wholly or partially? A. Now, this ply score to cover all floors, I had assumed —

Q. What item is that now? A. No. 4. I had assumed that that was in the plans and specifications.

THE COURT: The question is did you authorize it, not what you assumed.

THE WITNESS: I'll say yes, I did.

[125] THE COURT: You authorized it?

THE WITNESS: Yes.

* * *

Q. Do you see any other items on the list that you authorized as a claim for extra payment other than the contract price? A. Just a minute. (Perusing document.) I really don't know whether I authorized the ceiling translucent paneling in basement.

Q. What item are you referring to? A. No. 5. No. 6, extra wall —

Q. Let's don't go too fast. With reference to Item 5, you didn't know whether you authorized it? A. I do not recall.

Q. Do you object paying for that as an extra item? [126] A. I won't object.

Q. All right. Now, will you tell us whether there are any other items that you authorized as a claim for extra payment? A. Now, No. 6, I don't know what this change refers to, change front room in dental

office, but extra wall not shown on plans, front room in basement made into two rooms, put in hallway in basement, put in hallway on first floor -- this was authorized incident to something which followed.

Q. Is this an item which you authorized for extra payment? A. No, compensation.

* * *

[128] BY MR. FAUNTLEROY:

Q. When we left off, I think we had reached down to Item 5 on this list. I will ask you, Doctor, if there are any other items on this request for extra payment that you see that you authorized the plaintiff to install for you? A. Yes. The extra wall not shown on plans, front room in basement made into two rooms —

Q. No. Just tell us what items you authorized. A. No. 6 and No. 8.

THE COURT: You authorized 6 and 8?

THE WITNESS: No. 6 except at the cost of the glass, the original price given by Hires Turner.

* * *

BY MR. FAUNTLEROY:

[130] Q. Now, Doctor, please tell us only those items from Item 6 on down which you agreed to pay for the extra items. A. Well, No. 8, intercom system.

Q. Did you agree to pay for Item No. 8, the intercom system? A. Yes, No. 8, intercom system.

Q. Was that ever installed? A. No.

Q. Has it been installed to date? A. No, no.

Q. Now, are there any other items other than what you have told us about with exceptions of Items 9 and 14 that you authorized for extra payment? A. No.

* * *

Q. Now, did there come a time when you were asked to approve a fina

draw for the payment to Mr. Wade, the plaintiff? [131] A. Yes.

Q. Did you sign that final certificate for the authorization? A. No.

Q. Why is it you didn't sign it? A. I didn't sign it for several reasons. I did not agree with the extras and at that time, there was some question as to the ceiling in the building being the approved type and also there had not been installed a hot water heater as specified in the specifications. There had been no plumbing inspection at that time, plumbing inspection. There had been no electrical inspection and there was no consideration in respect to deductions because of the non-installation of the glass panels and the windows.

Q. Now -- A. Also I had not gotten a gas meter connection, plus other things, other deficiencies that were pointed out by various individuals.

Q. Now, Doctor, you heard Mr. Wade testify yesterday that the reason he didn't fur that wall in the basement on the left side of your building was because a garage was attached thereto while he was remodeling your building. Was that true? A. No, that wasn't true. That garage was torn down [132] I believe in 1961, I am not sure about that. That would have to come from the owner of the building next door.

MR. FAUNTLEROY: You may inquire.

Before counsel for the plaintiff cross-examines, I wonder at this time could I offer in evidence Defendants' Exhibit No. 6 which is a description of the Thinlite panels that were described to you.

* * *

MR. FAUNTLEROY: Very well, Your Honor. I will hold it until the architect takes the stand if that will be agreeable.

CROSS EXAMINATION

BY MR. COOKE:

* * *

[133] A. There is no bathroom on that floor. There is a toilet, two toilets, four toilets and one includes a shower.

Q. Yes. Now, isn't it a fact that you were trying to save that little room, whatever you call it, a toilet? Isn't it true you asked the contractor to save that? A. That was never an issue.

Q. I am not asking you whether it was an issue; I am asking you — A. I never have asked him to save it at all because I never considered it to be in jeopardy. That was all figured out by the architect.

Q. Now, your architect prepared the plans and specifications, did he not? A. Yes.

* * *

[135] Q. Now, Doctor, isn't it true that you started taking tours through the building before the contractor had gotten half way through the work? A. Well, there were individuals who asked to see the progress of the work. I will admit that, yes, but it was done in such a manner as to not interfere.

Q. Isn't it a fact that the tile which you have testified to in the front of this building was walked upon with some of your tours before it was completely dried? A. At that time it was walked on by everybody, there were no barriers, including workmen, myself and other individuals.

Q. Isn't it true that that caused this tile to slip, the condition that it later finds itself in? A. I really don't know.

* * *

[136] BY MR. COOKE:

Q. Now, Doctor, was Mr. Giles your architect? Did you consider him your architect? A. He prepared the plans and specifications for the building.

Q. Now, did you employ the services of Mr. Giles to supervise this work? A. It was understood that Mr. Archer, representative of the Industrial Bank, was in that capacity, that I was to pay him. I

could not afford two architects and as of this day, I have had no contact with Mr. Archer with respect to this job. I approved nothing. He hasn't even asked me for any payment.

Q. Dr. Walker, you just testified that Mr. Archer was the architect. Now, you accepted Mr. Archer as your architect, is that correct? A. The bank sent a letter to me stating that Mr. Archer would supervise the job at my expense.

Q. Did you object to that? A. I did not object. I sent a signed letter back to the bank and I made an assumption that it would be a satisfactory substitution for my architect.

Q. You could have employed Mr. Giles to supervise this work had you not believed Mr. Archer was satisfactory, couldn't you? [137] A. I beg your pardon?

Q. Rather, you would have employed another architect had you not thought Mr. Archer was satisfactory, wouldn't you? A. No, if Mr. Archer was satisfactory, there would be no reason to have another architect.

Q. Was he satisfactory to you? A. Well, no, he wasn't satisfactory to me. I did accept him on the basis of the bank's statement sent to me.

Q. Do you doubt his ability, or did you? A. I doubted his ability.

Q. But you made no effort to complain about this? A. No, in the beginning I told Mr. Doyle Mitchell that I would prefer not to have had Mr. Archer on the basis of previous experience.

Q. But nevertheless you did not do anything about it? A. No, I did not do anything about it. I assumed that he would carry it through to protect the bank.

Q. Were there times when Mr. Giles did come to the job while it was in progress? A. No, I kept in contact with Mr. Giles by phone in respect to anything which I felt was out of order, and that was on several occasions. I will enumerate them if you wish.

Q. Now, with reference to the glass which you have testified to —

[138] A. Which glass?

Q. The substitute, I believe, you ordered from Pittsburgh. A Pittsburgh order was obtained, is that correct? A. I did not put in any formal order to Pittsburgh Glass. I made a selection on the basis of their brochure which I intended to communicate to Mr. Wade. The following day, before I could do that as to my selection, a type of block had already been delivered. It was unacceptable to me but which I conceded that we would use anyway to conserve time, but which I would not use in the entirety of the building because of the sun-exposed side, the pediatric section. I did not want to use that Decora block at all because that would interfere with the air conditioning, year-round air conditioning.

Q. Now, Doctor, isn't it true that one substitute was supplied which you did not like and that was later changed for a glass which you picked? A. I was informed that the Decora block could not be returned. I took exception to that and I communicated with the bondsman in respect to that.

Q. When you say you took exception to that, what do you mean? A. I felt there was a satisfactory substitute to go in the back part of the building which could be gotten — [139] in fact, I knew there was a satisfactory substitute which could be gotten from the Pittsburgh Glass.

Q. Dr. Walker, let me get this clear. Your testimony is that originally you wanted Hires Turner glass, is that correct? A. That is right, that was in the plans and the specifications. I designed the building so that it would accept Hires Turner's glass and I expected it to be secured by contract in time to be placed. There were no exceptions.

Q. Once it was ascertained that Hires Turner's glass was not available for whatever reason it might have been, was there only one other order placed for glass after that or were there more than one order placed? A. I personally have placed no order. I made a specification as to what was to go in the building. Now, there was one departure from the sun-screening glass and that was in respect to the

front of the building for which I selected this Intaglio block to go in in these openings and I selected these because I felt they were adequate in giving sufficient screening out of the heat rays of the sun.

Q. Doctor, I am satisfied that you have your reasons for what you stated you preferred, but I am asking about the sequence of the orders for glass. How many different orders were placed for glass? [140] A. How many different orders? I don't know.

Q. Did you finally accept and approve and install the glass which was purchased after it was determined that Hires Turner Company would not supply you with the glass? Did you accept the next glass that was obtained? A. I was led to believe that Hires Turner would not supply the glass.

Q. Well, where did you get the glass that was finally installed, Doctor? A. The final glass came from Pittsburgh Glass people on New York Avenue. I went over there to look for a satisfactory substitute when it came to my realization that what was in the plans and specifications could not be put in before my first payment was due.

Q. Did you select this glass from Pittsburgh Glass yourself. A. I went over to Pittsburgh Glass —

Q. Just answer, did you select? A. The glass which came, I did not. The glass which came originally, I did not select. It came. I did not select it.

Q. Was that glass installed? A. Some of it was installed.

Q. What happened to the rest of the glass?

* * *

[141] Q. Doctor, you specified and requested that the contractor use Hires Turner glass, did you not? A. That was in the specifications and there was no alteration of that specification at all by me. I expected it.

Q. Now, had not you requested that it would have been upon the contractors to supply suitable glass from whatever company he chose, would it not?

* * *

Q. Mr. Wade reserved the right to order his materials from whomever he chose unless you requested otherwise, did he not?

* * *

[142] Q. But you required it, did you not, Doctor? You required that he use Hires Turner glass, did you not? A. Precisely.

Q. Right. Now, the fact that the glass was held up was because of Mr. Wade trying to comply with your demands, was it not?

* * *

Q. Doctor, I didn't say that you held them up. I asked whether the fact that Mr. Wade was trying to comply with your demands was responsible for the glass work being held up, was it not? [143] A. What demands?

Q. You requested a special type of glass which only Hires Turner sold, did you not? A. Mr. Wade had the plans and specifications and I think he was governed by those plans and specifications. He was simply to follow them up, that's all, the best way he saw fit.

Q. Those specifications expressed your demands, did they not? A. Yes, they were written out.

Q. I beg your pardon? A. They were written out in the plans and specifications.

Q. Who wrote them? A. The architect.

Q. And he wrote them at your request, did he not? A. Sure.

Q. Then it was an expression of your demands. A. There were other things I demanded about the building, sure. That is my prerogative.

Q. Now, wasn't there some prolonged discussion with reference to this glass between you and Mr. Wade as Hires Turner glass? A. There was discussion about it and Mr. Foley of [144] Hires Turner came over to expedite things, to get things going.

Q. Didn't Mr. Wade advise you that he had placed your order with Hires Turner the month of September 1963? A. I don't recall that but I assume that he did since it would take some time to have these panels

fabricated and the windows. I would assume that was done.

Q. Didn't Mr. Wade tell you that? A. I don't recall.

Q. Isn't it further true that when Mr. Wade contacted the company that it was learned that they did not have your order and it would take six or eight more weeks before it could be supplied? A. I had communicated with a company in Toledo, Ohio.

THE COURT: Answer the question.

THE WITNESS: Yes, it would have taken six or eight weeks.

BY MR. COOKE:

Q. Now, isn't it also true that you were anxious to have the glass sooner and, therefore, you did not desire to wait? A. Well, I understood I couldn't get it and there wasn't anything to do but look for a substitute.

Q. But you understood that the contractor had placed this order, did you not? [145] A. I assumed that he had, I mean he is the contractor. I suppose the subcontractor follows the rules. I assumed that.

Q. Now, Doctor, there were three installments paid to the contractor according to the progress of the work, was there not? A. I made that assumption. I had authorized no payments.

Q. I beg your pardon? A. I had authorized no payments.

Q. You had or had not? A. I had not.

Q. Well, according to the arrangements that you had with the bank and the architect, it was not necessary for you to authorize payment. A. Well, I assumed that I had to authorize, I had to sign, my wife and myself. I made that assumption.

Q. Well, you were aware of the agreement which you had signed, which is in evidence as Plaintiff's Exhibit No. 7, authorizing Mr. Archer to make these inspections, weren't you? A. Yes, and I was to pay him.

Q. I am not asking about the pay, but I am saying you authorized Mr. Archer in this writing to do that job. A. To make the inspections.

[146] Q. You authorized each item on here, did you not, when you signed it? A. Let me read that again, please.

(Plaintiff's Exhibit No. 7 handed to the witness.)

MR. FAUNTLEROY: Your Honor, I think the document speaks for itself. If that is what it says, I think that is it.

THE COURT: He wants to add something to it. Let's see what it is.

(Short pause in proceedings.)

THE WITNESS: I agreed to this, each draw to be approved by Mr. R. C. Archer, architect, incident to the work being up to standard as per contract specifications.

BY MR. COOKE:

Q. Therefore, Doctor, you had yielded that right to someone else to authorize these installment payments, had you not? A. There was an authorization.

Q. Right — A. Incident to every other thing being followed up in respect to the plans and specifications of the contract.

Q. Well, you gave Mr. Archer, the architect, that right in this same document, did you not? A. I assumed he would live up to his obligations.

[147] Q. Yes. Now, at any time did you ever raise any objection to Mr. Archer's performance prior to the demand for the final draw? A. No, I had made no objection. I assumed that he was following through properly.

Q. Then you felt that the work had been done? A. I assumed he was in contact with the work and knew what was going on, and was looking after the interest of the bank in respect to the work being done up to the moneys involved.

THE COURT: Doctor, will you try to limit your answers to the questions.

BY MR. COOKE:

Q. Now, Doctor, you maintained your office on these premises dur-

ing the entire time of these renovations, did you not? A. I maintained my work, yes.

Q. So you were present on all occasions, weren't you? A. I was there most of the time. I was quite busy trying to make ends meet.

Q. Now, if the matters in items which you have testified to today which you call deficiencies existed, if they exist now, they existed before, did they not? A. Well, yes.

[148] Q. But you raised no objection before, did you? A. Well, in the plans and specifications, it was brought out there would be proper deductions in respect to deficiencies and failure of workmanship.

Q. Well, Doctor, you have testified from your personal observation as to a list of approximately 40 or 50 items which you observed personally, which you consider deficiencies in this building. Now, are you telling this Court that all of these deficiencies only showed up after the demand was made for the final draw? A. I wouldn't say that.

Q. Do you say that they existed before? A. If there were deficiencies, they were deficiencies all along. I concede that.

Q. I am not using your term "deficiencies" without some qualification; I am saying alleged deficiencies. Are you saying that they did exist before then, before this demand for the final draw? A. Sure.

Q. And you raised no objection? A. I spoke of these things to some of my friends about the work.

Q. But you never notified the bank or your architect to refuse to pay any more money, did you? Did you try to stop any payments prior to this last draw? [149] A. I made no stopping of any payments. Officially, by document, I never even approved of any payments, to tell you the truth.

Q. I think you have testified that that responsibility you had signed away to someone else, so there was no need for you to approve it. A. I mean I assumed that there was some document I would have to sign when they released money. I made that assumption.

Q. Now, Doctor, at the time that this final installment was de-

manded, when a request was made for this final installment, how much money did you have on your account earmarked for this job? A. I don't recall.

MR. FAUNTLEROY: I object.

BY MR. COOKE:

Q. Doctor, how much money did you borrow for this work? A. Well, I borrowed $50,000. Mr. Wade gave me a figure of $49,995 which really did not cover the whole thing.

Q. How much money did you borrow? A. $50,000.

Q. Fifty thousand? A. Yes.

Q. Now, Mr. Wade's contract utilized that entire [150] amount except for $5, is that correct? A. It was utilized, yes.

Q. Now, Doctor, was there any encumbrance on this property at the time? A. There was a balance of approximately $2,700 and that was discussed with Mr. Wade.

Q. When you say "that was discussed," what do you mean? A. Yes. He knew of this. He knew that the payments equaled $6,000 and the indication was we could get together on that later on. There were no official papers drawn up at all. I was very happy to have gotten this issuance from Mr. Wade.

Q. But that understanding was provided — A. Provided what?

Q. I thought you were going to say something. Provided you paid Mr. Wade without any misunderstanding, wasn't it? A. Yes, and there was no question in my mind but that would be paid. That was contingent upon the work being done as it was supposed to be done, according to the plans and specifications without any degradation of the building. My idea was to improve it as it went along and if there was any more money to be borrowed —

THE COURT: Doctor, will you please confine your answers to the questions. When they can be answered yes or [151] no, just say yes or no. When they call for a simple statement, let's have a simple statement.

BY MR. COOKE:

[151] Q. Now, Doctor, did not Mr. Wade submit to you a request for payment dated February 17, 1964? A. He submitted to me his request for payment.

Q. I show you Plaintiff's Exhibit No. 9 and ask you if that is your signature? A. Yes, this is a statement here, his request for payment. I didn't consider that an authorization.

THE COURT: The answer is yes?

THE WITNESS: Yes.

BY MR. COOKE:

Q. You did not consider it an authorization but what did you consider it? A. That he could make a request for payment. He said it was a request.

Q. Why did you think you were signing your name, Doctor? A. Well, there had been a lot of harassment at this time —

Q. Are you saying you were threatened? A. By Mr. Wade, there was a lot of harassment. He wanted to fight me. In the building, there was a great deal [152] of disturbance among the men who were working. They weren't happy. They said they weren't paid. I was somewhat under duress and I signed that piece of paper but I didn't consider it an authorization.

Q. You are saying that you signed this under duress? A. I said there was quite a bit of disturbance in the building.

Q. You are testifying that you signed this under duress? A. Yes, in respect to the general atmosphere of the building.

THE COURT: What is that exhibit? What exhibit number is that?

MR. COOKE: This is Plaintiff's Exhibit No. 9, Your Honor.

BY MR. COOKE:

Q. Who was forcing you to sign this? A. Well, no one forced me to sign it but it was simply the state of mind I was in at the time.

Q. Was Mr. Wade responsible for your frame of mind at that time? A. The general atmosphere in the building. There was quite a bit of commotion, individuals, workmen around drinking and there was scuffling here and there, and so forth. [153] A lot of complaints about not being paid by Mr. Wade and other complaints.

Q. Now, Doctor, you have apparently had the normal formal training because you are an M. D. A. Yes. I am human too.

Q. You are probably rated of the higher intellectual group. And you mean to tell me and to tell this Court that you signed this paper with your name under duress, which is Plaintiff's Exhibit 9? Isn't it a fact that you intended for this signature to be an approval of the final draw? A. No. I expected to put my signature on some final document.

Q. I beg your pardon? A. I expected to put my signature on some final document issued by the bank. I was approached in respect to that by Mr. Archer and Mr. Wade prior to that, which I didn't follow through on.

Q. Now, Doctor, what is your annual income? A. Well, that varies. I mean, while this work was going on —

Q. No. You are not being responsive. I am asking what is your average annual income?

MR. FAUNTLEROY: Just a moment before you answer that question, Dr. Walker.

[154] I don't think that question is material to the issues in this case, Your Honor.

MR. COOKE: I think it is, Your Honor. I think there is an allegation that the defendant was caused to lose money because of this work and I believe he testified on direct examination —

MR. FAUNTLEROY: May I finish my statement, Your Honor? I was getting ready to say that because of the record, we have withdrawn any request for the loss of earnings of Dr. Walker during this period of time, which I think would obviate the necessity for going into his income.

THE COURT: There has been a formal withdrawal of that allegation?

MR. FAUNTLEROY: Yes, Your Honor.

MR. COOKE: Your Honor, I beg the Court's pardon for indulging into that. If that is true, I have no knowledge whatsoever of that.

THE COURT: All we have is the attorney's statement. If your complaint is right, it is within the bounds of the written complaint.

Are you withdrawing any claims for loss of earnings?

THE WITNESS: Yes.

THE COURT: That is with your attorney's consent?

MR. FAUNTLEROY: Yes, Your Honor.

[155] THE COURT: We will consider the claim of earnings withdrawn and proceed with the rest of the case.

MR. COOKE: Thank you, Your Honor.

BY MR. COOKE:

Q. Now, Doctor, the floor in the basement of the building that you have alleged was uneven was completed as it now stands prior to the time that Mr. Wade drew his third installment, was it not? A. I don't know. I really don't know. I believe so. I can't pinpoint that.

THE COURT: Excuse me. Just for the record, let it be indicated that paragraph 3 of the counterclaim of the defendants has been withdrawn.

MR. COOKE: Would the Court indulge counsel, please?

(Short pause in proceedings.)

THE COURT: Mr. Fauntleroy, in connection with the withdrawal of this counterclaim, I need some clarification. Judge Curran signed an order on February 16, 1965, raising the total amount of the claim to $21,253.06.

MR. FAUNTLEROY: Yes.

THE COURT: Within that amount, how much is represented by the withdrawal of the claim for loss of earnings?

MR. FAUNTLEROY: None, Your Honor. That was my oversight. When I asked for the ad dammum clause to be [156] increased, it was only increased to cover the actual amount of the cost for correcting

the deficiencies. I overlooked including it in that amount.

THE COURT: This $21,253.06 is alleged cost of remedying the deficiencies?

MR. FAUNTLEROY: That is correct, Your Honor.

THE COURT: That has nothing to do with his loss of earnings?

MR. FAUNTLEROY: That is correct, yes.

BY MR. COOKE:

Q. Now, Doctor, when did you complete the financing for this loan of $50,000? A. I don't recall the exact date but I think it was in April of 1963. I think it was approved in April of 1963 — I am not sure.

Q. Doctor, I will show you Plaintiff's Exhibit No. 8, which is in evidence, which is a deed of trust, and I ask you is that your signature? A. Yes.

Q. What date appears on that? A. This is the 28th day of October.

Q. What year? A. 1963. I had in mind the bank's approval of the loan. I am not well versed in the technicalities of these things.

* * *

[157] REDIRECT EXAMINATION

BY MR. FAUNTLEROY:

* * *

Q. Now, you also on cross-examination mentioned that you were led to believe that the glass could not be secured from Hires Turner but you did not tell us who led you to believe that. Could you clarify that for us? [158] A. Mr. Wade stated that Hires Turner had goofed, that is all, and had not followed through on the order to be fabricated.

Q. Did there come a time when you learned that an order had not been placed for this glass? A. Yes.

Q. When? A. I can't specify the exact time but I did send a telegram.

MR. COOKE: I object. I don't feel that this is proper redirect examination, Your Honor. I don't think this is a matter which counsel

has not raised on his direct and I don't think any question has been raised relative to that on cross-examination.

THE COURT: I think you did go into it on cross-examination.

MR. COOKE: I believe though, Your Honor, counsel has asked that question on direct examination.

THE COURT: I will allow it. Go ahead.

* * *

BY MR. FAUNTELROY:

* * *

[159] A. Yes, I did. I received a letter.

Q. I show you what has been marked as Defendants' Exhibit No. 7 for identification and ask you to identify that. A. This is the letter which I received from Hires Turner Glass Company signed by Mr. Jarvis, the manager. This is in response to my telegram.

Q. As a result of this letter -- I will strike that question.

MR. FAUNTLEROY: I think at this time, Your Honor, that it would be appropriate for us to introduce into evidence Defendants' Exhibit No. 7. I think this document has been identified at pre-trial. It has further been stated -- Dr. Walker has stated that he was told by Mr. Wade that the glass could not be secured from Hires Turner when in fact this letter, this document shows that it was actually never ordered through Hires Turner Glass Company. So on the basis of that, Your Honor, I would offer this in evidence. It has been stipulated at pre-trial that this can be admitted into evidence, of course, subject to materiality and relevancy, and I think it is proper at this time to offer it in evidence.

THE COURT: Do you want to state your objection?

MR. COOKE: Yes, Your Honor. In addition to the fact that Your Honor has ruled on this prior to lunch that it would not be admitted, I still maintain that it is not relevant. * * *

* * *

THE COURT: I do not think it carries much weight but I will admit it in evidence.

THE DEPUTY CLERK: Defendants' No. 7 marked into evidence.

(Defendants' Exhibit No. 7 for identification was received in evidence.)

* * *

[161] RECROSS-EXAMINATION

BY MR. COOKE:

Q. Dr. Walker, isn't it true that you merely raised these objections as to the contractor's work at this late period because you realize you do not have enough finance on hand to pay the bill?

THE COURT: You can answer that yes or no.

THE WITNESS: Well, specify the bills.

BY MR. COOKE:

Q. I say to pay the balance of the contract price. I referred to it as to pay the bill. A. The balance of the contract price as alleged?

Q. Right. A. I don't have that much on hand.

Q. I don't mean personally, I mean of the money you borrowed. It is still short by far of a sufficient balance to pay and satisfy what is due on the contract, isn't that right? A. Well, as alleged, I will say yes, but I have access to my —

MR. COOKE: I have no further questions. That is all.

FURTHER REDIRECT EXAMINATION

BY MR. FAUNTLEROY:

Q. Are you speaking, Doctor, of the alleged claim of [162] the $12,000 final draw plus the $5,000 for the extra work? A. Yes. I don't have that on hand.

MR. FAUNTLEROY: Very well.

FURTHER RECROSS-EXAMINATION

BY MR. COOKE:

Q. As a matter of fact, Doctor, you don't have enough there to pay the $12,000, do you? A. In the bank, $12,000 in the bank?

Q. That is correct. A. No, I haven't. As I said, I have obtained other loans or my intentions were to get other loans so we can pay it off. That is no problem.

MR. COOKE: That is all. Thank you.

THE COURT: The Court will take a five-minute recess.

(Whereupon at 2:47 p.m., a recess was taken.)

(The witness Claude G. Walker resumed the stand, and the following proceedings were had:)

THE COURT: Haven't you finished with this witness?

MR. FAUNTLEROY: The question was raised and I think it should be cleared up, Your Honor, unless the Court is satisfied.

THE COURT: This is getting to be an endless procedure. Go ahead. Ask your question.

* * *

[164] EMMETT C. WADE

* * *

DIRECT EXAMINATION

BY MR. FAUNTLEROY:

Q. I show you, Mr. Wade, what has been marked Plaintiff's Exhibit No. 3, which contains a standard form of agreement between contractor and owner and the general conditions of contract for the construction of the building. I will ask you who prepared that? [165] A. I prepared that, sir.

* * *

LEWIS W. GILES

* * *

DIRECT EXAMINATION

BY MR. FAUNTLEROY:

Q. State your full name, sir. A. Lewis W. Giles.

Q. And what is your occupation, Mr. Giles? A. I am an architect.

Q. And your offices are where? A. 4645 Deane Avenue, Northeast.

Q. Now, directing your attention to what has been identified as Plaintiff's Exhibit No. 2, which contains specifications for a job at 3103 Georgia Avenue, with attached plans, and I will ask you if you prepared these? A. (Perusing document) Yes, I prepared these.

[166] Now, I will ask you, Mr. Giles, did there come a time when you were called upon to make an inspection of this building? A. That is right.

Q. Now,first of all, you were hired by whom to draw these plans and specifications? A. Dr. Walker.

Q. And there came a time when he asked you to inspect the building, is that correct? A. That is right.

Q. Will you tell us approximately when that was? A. In March of 1964.

Q. Will you tell us what you found, sir, upon your inspection? A. Well, this is the list, the letter that I wrote to Dr. Walker at the time: "Dear Dr. Walker" --

Q. Instead of reading that, will you just tell us what you found, Mr. Giles? A. Sill under the front entrance door not properly installed.

Tile work in stair hall not complete.

Excessive undercut to door entering waiting room.

Hole in wall under service equipment in basement hall.

No enclosure for service equipment in basement hall.

[167] Rear door to basement waiting room does not open fully.

Doors in lavatories improperly installed resulting in switches and lights back of doors.

Weather-exposed wall not furred before plastering.

Leak in old roof not repaired.

Steel beams and lintels not painted.

Q. Where are these steel beams you are referring to? A. They are in the rear in the addition to the building.

Utility sink out of order. Tile missing around light switches.

THE COURT: What was missing?

THE WITNESS: Tile was missing.

Hand driers not installed.

Now, there were other deficiencies that were listed on another sheet.

BY MR. FAUNTLEROY:

Q. Well, will you tell us all the deficiencies that you found as of the date you inspected the building? A. Yes. Some of these on here are repetitious of what we have here, sir.

Window caulking adjustment incomplete.

Q. What do you mean by that, Mr. Giles? A. The material that is put around the window to keep the weather out from around the frame.

[168] Q. Do you remember which windows they were? A. They were in the rear of the new addition of the building.

The floor in the rear was not level in the basement.

Q. Now, will you explain that a little more fully, please? A. Well, the floor slanted from the north wall over south to the south wall in one room there, the north room of the basement.

Q. Can you think of any reason why that floor would not be level? A. No.

Q. All right. You may continue. A. I beg your pardon?

Q. You may continue. A. Well, I think that was all. This other is repetitious of what I had in here.

Q. Now, I show you what has been marked as Plaintiff's Exhibit No. 4 and ask you to look at Item No. 1. That is a claim for extra services or work performed by the plaintiff. Now, would you consider, sir, whether or not that —

MR. COOKE: I object, Your Honor. I don't think that counsel has

qualified the witness as an expert witness. I don't think he is qualified to give an opinion or a conclusion.

[169] MR. FAUNTLEROY: I didn't think that was an issue but I will qualify him if you care.

THE COURT: Go ahead and qualify him.

BY MR. FAUNTLEROY:

Q. Mr. Giles, what is your occupation? A. I am an architect.

Q. How long have you been an architect? A. About 40 years.

Q. Are you registered in the District of Columbia? A. Yes, uh-huh.

Q. What schools did you go to, sir? A. I went to the University of Illinois.

Q. Did you graduate? A. No, I went 2-1/2 years and then went in the Army.

Q. You have been a registered architect for how long? A. Since 1944 when they started registering architects in the District of Columbia.

Q. Before that in the District of Columbia, they didn't register architects? A. No.

Q. So since the registration in the District of Columbia, you have been registered? A. That is correct.

Q. Have you been actively engaged in the practice since that time? [170] A. Yes.

Q. Have you performed work on buildings similar to the one in question? A. Yes.

MR. FAUNTLEROY: I submit he is an expert, Your Honor.

THE COURT: I will accept his qualifications.

BY MR. FAUNTLEROY:

Q. Now, with reference to Item No. 1, would you consider that a proper charge for extra payment?

MR. COOKE: Your Honor, I object to that question. I think the defendant himself has stated that he authorized it.

THE COURT: I believe that is true, Mr. Fauntleroy. He said he authorized it. He wanted the protection of a bond.

MR. FAUNTLEROY: Yes.

THE COURT: You are going to gild the lily and ask how it was a proper charge?

MR. FAUNTLEROY: I will withdraw that question, Your Honor.

Q. Directing your attention to Item No. 7 of the general conditions of the specifications, Mr. Giles. The last sentence, the last phrase behind the comma on the fourth [171] line says, "and shall furnish a satisfactory performance bond guaranteeing completion of the work."

Would you tell us whether or not this was to be included in the contract price? A. Yes. The contract says the contractor shall furnish satisfactory performance bond guaranteeing completion of the work.

Q. Do you know whether or not the plaintiff furnished this performance bond? A. No, I do not.

* * *

[172] Q. We are talking now, Mr. Giles, about Item 4. A. Yes. The specifications provided in 50(d) on page 6, "Furnish and lay all asbestos tile flooring, including masonite underlayment on wood floors."

Q. And would you consider that a proper claim for extra charge? A. No.

Q. Now with reference to Item No. 10 which reads, "Cost of hardware over the $200 allowance." Would you tell me whether or not that is correct, according to the specifications? A. No. The specifications in Paragraph 23(b) provided that the contractor shall furnish and install all finishing hardware, allowing $300 for same to be selected by the owner.

Q. So where the figure says cost of hardware over $200, it should be over $300; is that correct? A. Yes.

Q. Now, since you made that inspection in March of 1964, have you had occasion or occasions to inspect the building subsequent to

that time? A. Well, I was up there yesterday but I was called on such short notice that I was not able to make a thorough inspection. I was up there about a half an hour.

Q. Do you know whether or not any of the deficiencies [173] that you have related to us have been corrected since your original inspection in March of 1964? A. I do not believe so.

* * *

CROSS-EXAMINATION

BY MR. COOKE:

* * *

[175] THE COURT: He testified from memory theoretically. He didn't put a document in evidence.

* * *

[176]

Q. Yes. Now, are you familiar with any conversation between Dr. Walker and Mr. Wade or yourself pertaining to saving a bathroom? A. Saving a bathroom.

Q. Yes, saving a bathroom on the basement level of the building.

[177] A. I don't remember.

Q. Do you recall any discussion as to how the floor would have to be arranged in order to accommodate the front line with the back line? A. I remember we had to raise the bathroom floor in order to get into the sewer, yes.

Q. I see. Now, this was agreed upon by all at that time, was it not? A. Yes.

THE COURT: When you say "by all," whom do you mean?

BY MR. COOKE:

Q. I mean you as the architect and Dr. Walker as owner and Mr. Wade as the contractor. A. Yes.

* * *

[180] ORAL RULING OF THE COURT

THE COURT: It appears to the Court that the plaintiff has established the necessary grounds for the attachment of a lien, that the burden was then shifted to the defendant to go forward and carry the burden as to why the lien should not attach.

The Court cannot find where the defendant has established or carried the burden of proof to prevail on its counterclaim. It has established no measure of damages as to what it would take to go forward and complete the job.

Under all the circumstances, the Court will direct a judgment for the plaintiff and request the plaintiff's attorney to submit appropriate findings of fact and conclusions of law.

* * *

MR. FAUNTLEROY: Could I be heard, Your Honor, [181] before Your Honor rules? I didn't know Your Honor was going to rule. I thought we would have a chance to comment.

THE COURT: Do you want to comment?

MR. FAUNTLEROY: Yes, if Your Honor pleases.

THE COURT: Go ahead.

* * *

[195] SUPPLEMENTAL ORAL RULING OF THE COURT

THE COURT: Let me amplify my prior ruling. Not expecting to have to rule so quickly, I spoke too quickly.

As to the basic claim for the $12,000 final draw, I do not think there is any question on the evidence -- Mr. Archer approved for the bank and the doctor himself signed the acquiescence to the last draw -- that the work was substantially completed and that draw was due.

The defense has produced no evidence of any weight that would indicate the damage to the building, the amount of the damage or what it would cost to remedy any of these alleged defects. There is nothing for the Court to rule on. Even if defects existed, I haven't the vaguest

idea as to [196] what it would cost to remedy it. I do not feel that I can just take a figure out of thin air and say it is going to cost $5,000 to fix up the tile floor or repair the defects in the tile floor, if the defects did exist.

We have had two architects on the stand. The burden of the evidence is that the work was performed. The price was agreed to be paid by the agent of the doctor. So as far as the basic claim for the $12,000 draw is concerned, my judgment stands.

As to the extras, the doctor himself has testified that he authorized the placement of the completion bond for his own protection, and he made no claim for that or did not care to defend against this claim made by the plaintiff.

The only place that I can see any conflict in the evidence is in connection with the intercom system. The only evidence concerning that is it does not exist. I will allow a credit to the defendant for that item.

There is also testimony by Mr. Giles that the cost of the hardware -- and this is substantiated by the contract -- the cost allowed for hardware was $300.00. That would call for $100.00 adjustment on that item.

Other than that, the Court feels that the plaintiff has sustained the burden of proof as to those matters as to [197] which he is required to sustain the burden of proof and that the defendant has failed to sustain the burden of proof as to those matters as to which he is required to sustain the burden of proof.

The Court's judgment, with those modifications, stands.

* * *

[PLAINTIFF'S EXHIBIT 2]

[Filed SEP 22 1965]

SPECIFICATIONS

These Specifications - together with the accompanying Drawings - describe the materials to be furnished and the labor to be used in the completion of ALTERATIONS AND REPAIRS to the two-story medical building located on lot 10 square 3047 and known as 3103 Georgia Ave., NW., Washington, D.C.

Before submitting a proposal, bidders shall visit the site of the proposed work and fully inform themselves of the existing conditions and limitations, and shall include in their proposals a sum to cover the cost of all work included in the Drawings and Specifications.

The Owner reserves the right to reject the lowest and all other proposals.

DR. CLAUDE G. WALKER — Owner

LEWIS W. GILES — Architect

January 19, 1963

GENERAL CONDITIONS

1 The Drawings and Specifications are complementary, and what is shown on one shall be as binding as if called for by both. The intention of the Drawings and Specifications is to include all materials and labor reasonably necessary for the completion of the work.

2 Sound old materials wrecked from the building may be re-used in the new work, all salvaged materials and equipment to become the property of the Contractor. All other materials shall be new, and both materials and workmanship shall be of good quality.

3 Unless otherwise specified, the Contractor shall provide and pay for all materials, labor, tools, and construction equipment required in the execution of the work.

4 The Owner without invalidating the Contract, may order changes by altering, adding to, or deducting from the work, the contract sum being adjusted accordingly. The Contractor shall make no change in the work, however, unless in pursuance of a written order from the Owner.

5 The Contractor shall promptly replace all materials and re-execute all work failing to meet the requirements of the Drawings and Specifications, and he shall remedy all defects due to faulty materials or workmanship that shall appear within one year from the time of acceptance of the work.

6. The Owner, thru the Architect, will secure the building permit. The Contractor shall obtain and pay for any other required permits, give all notices, and comply with all rules and regulations bearing on the conduct of the work as drawn and specified.

7 The Owner will carry fire insurance on the building. The Contractor shall maintain such insurance as will protect himself and the Owner from claims for personal injury, including death, that may arise directly or indirectly from operations under this Contract, and shall furnish a satisfactory performance bond guaranteeing completion of the work.

8 The Contractor shall protect the Owner's property and adjacent property from damages that may arise from operations under this Contract, and he shall restore all such property damaged by him to as good condition as it was immediately prior to his operations.

9 Before the final payment becomes due, the Contractor shall deliver to the Owner a complete release of liens, showing that all materials and labor used on the work have been paid for.

10 At the completion of the work, the Contractor shall remove all surplus materials and all his tools and equipment from and about the building, and shall leave the work broom clean.

[page 1]

[PLAINTIFF'S EXHIBIT 3]

and if the inspection is by another authority than the Architect, of the date fixed for such inspection, required certificates of inspection being secured by the Contractor. Observations by the Architect shall be promptly made, and where practicable at the source of supply. If any work should be covered up without approval or consent of the Architect, it must, if required by the Architect, be uncovered for examination at the Contractor's expense.

Re-examination of questioned work may be ordered by the Architect and if so ordered the work must be uncovered by the Contractor. If such work be found in accordance with the Contract Documents the Owner shall pay the cost of re-examination and replacement. If such work be found not in accordance with the Contract Documents the Contractor shall pay such cost, unless it be found that the defect in the work was caused by a Contractor employed as provided in Article 35, and in that event the Owner shall pay such cost.

ARTICLE 14

SUPERINTENDENCE: SUPERVISION

The Contractor shall keep on his work, during its progress, a competent superintendent and any necessary assistants, all satisfactory to the Architect. The superintendent shall not be changed except with the consent of the Architect, unless the superintendent proves to be unsatisfactory to the Contractor and ceases to be in his employ. The superintendent shall represent the Contractor in his absence and all directions given to him shall be as binding as if given to the Contractor. Important directions shall be confirmed in writing to the Contractor. Other directions shall be so confirmed on written request in each case. The Architect shall not be responsible for the acts or omissions of the superintendent or his assistants.

The Contractor shall give efficient supervision to the work, using his best skill and attention. He shall carefully study and compare all drawings, specifications and other instructions and shall at once report to the Architect any error, inconsistency or omission which he may discover, but he shall not be liable to the Owner for any damage resulting from any errors or deficiencies in the contract documents or other instructions by the Architect.

ARTICLE 15

CHANGES IN THE WORK

The Owner, without invalidating the Contract, may order extra work or make changes by altering, adding to or deducting from the work, the Contract Sum being adjusted accordingly. All such work shall be executed under the conditions of the original contract except that any claim for extension of time caused thereby shall be adjusted at the time of ordering such change.

In giving instructions, the Architect shall have authority to make minor changes in the work, not involving extra cost, and not inconsistent with the purposes of the building, but otherwise, except in an emergency endangering life or property, no extra work or change shall be made unless in pursuance of a written order from the Owner signed or countersigned by the Architect, or a written order from the Architect stating that the Owner has authorized the extra work or charge, and no claim for an addition to the contract sum shall be valid unless so ordered.

The value of any such extra work or change shall be determined in one or more of the following ways:

a) By estimate and acceptance in a lump sum.

b) By unit prices named in the contract or subsequently agreed upon.

c) By cost and percentage or by cost and a fixed fee.

If none of the above methods is agreed upon, the Contractor, provided he receives an order as above, shall proceed with the work. In such case and also under case (c), he shall keep and present in such form as the Architect may direct, a correct account of the cost, together with vouchers. In any case, the Architect shall certify to the amount, including reasonable allowance for overhead and profit, due to the Contractor. Pending final determination of value, payments on account of changes shall be made on the Architect's certificate.

Should conditions encountered below the surface of the ground be at variance with the conditions indicated by the drawings and specifications the contract sum shall be equitably adjusted upon claim by either party made within a reasonable time after the first observance of the conditions.

ARTICLE 16

CLAIMS FOR EXTRA COST

If the Contractor claims that any instructions by drawings or otherwise involve extra cost under this Contract, he shall give the Architect written notice thereof within a reasonable time after the receipt of such instructions, and in any event before proceeding to execute the work, except in emergency endangering life or property, and the procedure shall then be as provided for changes in the work. No such claim shall be valid unless so made.

ARTICLE 17

DEDUCTIONS FOR UNCORRECTED WORK

If the Architect and Owner deem it inexpedient to correct work injured or done not in accordance with the Contract, an equitable deduction from the contract price shall be made therefor.

ARTICLE 18

DELAYS AND EXTENSION OF TIME

If the Contractor be delayed at any time in the progress of the work by any act or neglect of the Owner or the Architect, or of any employee of either, or by any separate Contractor employed by the Owner, or by changes ordered in the work, or by strikes, lockouts, fire, unusual delay in transportation, unavoidable casualties or any causes beyond the Contractor's control, or by delay authorized by the Architect pending arbitration, or by any cause which the Architect shall decide

day's written notice to the Owner and the Architect, stop the work, or terminate this Contract as set out in the preceding paragraph.

ARTICLE 24

APPLICATIONS FOR PAYMENTS

At least ten days before each payment falls due, the Contractor shall submit to the Architect an itemized application for payment, supported to the extent required by the Architect by receipts or other vouchers, showing payments for materials and labor, payments to subcontractors and such other evidence of the Contractor's right to payment as the Architect may direct.

If payments are made on valuation of work done, the Contractor shall, before the first application, submit to the Architect a schedule of values of the various parts of the work, including quantities, aggregating the total sum of the Contract, divided so as to facilitate payments to subcontractors in accordance with Article 37(c), made out in such form as the Architect and the Contractor may agree upon, and, if required, supported by such evidence as to its correctness as the Architect may direct. This schedule, when approved by the Architect, shall be used as a basis for Certificates for Payment, unless it be found to be in error. In applying for payments, the Contractor shall submit a statement based upon this schedule.

If payments are made on account of materials not incorporated in the work but delivered and suitably stored at the site, or at some other location agreed upon in writing, such payments shall be conditioned upon submission by the Contractor of bills of sale or such other procedure as will establish the Owner's title to such material or otherwise adequately protect the Owner's interest including applicable insurance.

ARTICLE 25

CERTIFICATES FOR PAYMENTS

If the Contractor has made application for payment as above, the Architect shall, not later than the date when each payment falls due, issue a Certificate for Payment to the Contractor for such amount as he decides to be properly due, or state in writing his reasons for withholding a certificate.

No certificate issued nor payment made to the Contractor, nor partial or entire use or occupancy of the work by the Owner, shall be an acceptance of any work or materials not in accordance with this contract. The making and acceptance of the final payment shall constitute a waiver of all claims by the Owner, other than those arising from unsettled liens, from faulty work appearing after final payment or from failure to comply with drawings and specifications and the terms of any special guarantees specified in the Contract and of all claims by the Contractor, except those previously made and still unsettled.

Should the Owner fail to pay the sum named in any Certificate for Payment issued by the Architect or in any award by arbitration, upon demand when due, the Contractor shall receive, in addition to the sum named in the Certificate for Payment, interest thereon at the legal rate in force at the place of building.

ARTICLE 26

PAYMENTS WITHHELD

The Architect may withhold or, on account of subsequently discovered evidence, nullify the whole or a part of any certificate to such extent as may be necessary in his reasonable opinion to protect the Owner from loss on account of:

a) Defective work not remedied.

b) Claims filed or reasonable evidence indicating probable filing of claims.

c) Failure of the Contractor to make payments properly to subcontractors or for material or labor.

d) A reasonable doubt that the contract can be completed for the balance then unpaid.

(e) Damage to another Contractor.

When the above grounds are removed payment shall be made for amounts withheld because of them.

ARTICLE 27

CONTRACTOR'S LIABILITY INSURANCE

The Contractor shall maintain such insurance as will protect him from claims under workmen's compensation acts and other employee benefits acts; from claims for damages because of bodily injury, including death, to his employees and all others; and from claims for damages to property—any or all of which may arise out of or result from the Contractor's operations under this Contract, whether such operations be by himself or by any subcontractor or anyone directly or indirectly employed by either of them. This insurance shall be written for not less than any limits of liability specified as part of this Contract. Certificates of such insurance shall be filed with the Owner and Architect.

ARTICLE 28

OWNER'S LIABILITY INSURANCE

The Owner shall be responsible for and at his option may maintain such insurance as will protect him from his contingent liability to others for damages because of bodily injury, including death, which may arise from operations under this contract, and any other liability for damages which the Contractor is required to insure under any provision of this contract.

ARTICLE 29

FIRE INSURANCE WITH EXTENDED COVERAGE

Unless otherwise provided, the Owner shall effect and maintain fire insurance with extended coverage upon the entire structure on which the work of this contract is to be done to one hundred per cent of the insurable value thereof, including items of labor and materials

connected therewith whether in or adjacent to the structure insured, materials in place or to be used as part of the permanent construction including surplus materials, shanties, protective fences, bridges, temporary structures, miscellaneous materials and supplies incident to the work, and such scaffoldings, stagings, towers, forms, and equipment as are not owned or rented by the Contractor, the cost of which is included in the cost of the work. Exclusions: This insurance does not cover any tools owned by mechanics, any tools, equipment, scaffolding, staging, towers, and forms owned or rented by the Contractor, the capital value of which is not included in the cost of the work, or any cook shanties, bunk houses or other structures erected for housing the workmen. The loss, if any, is to be made adjustable with and payable to the Owner as Trustee for the insureds and Contractors and subcontractors as their interests may appear, except in such cases as may require payment of all or a proportion of said insurance to be made to a mortgagee as his interests may appear.

Certificates of such insurance shall be filed with the Contractor if he so requires. If the Owner fails to effect or maintain insurance as above and so notifies the Contractor, the Contractor may insure his own interests and that of the subcontractors and charge the cost thereof to the Owner. If the Contractor is damaged by failure of the Owner to maintain such insurance or to so notify the Contractor he may recover as stipulated in the Contract for recovery of damages. If other special insurance not herein provided for is required by the Contractor, the Owner shall effect such insurance at the Contractor's expense by appropriate riders to his fire insurance policy. The Owner, Contractor, and all subcontractors waive all rights, each against the others, for damages caused by fire or other perils covered by insurance provided under the terms of this article, except such rights as they may have to the proceeds of insurance held by the Owner as Trustee.

The Owner shall be responsible for and at his option may insure against loss of use of his existing property, due to fire or otherwise, however caused. If required in writing by any party in interest, the Owner as Trustee shall, upon the occurrence of loss, give bond for the proper performance of his duties. He shall deposit any money received from insurance in an account separate from all his other funds and he shall distribute it in accordance with such agreement as the parties in interest may reach, or under an award of arbitrators appointed, one by the Owner, another by joint action of the other parties in interest, all other procedure being as provided elsewhere in the Contract for arbitration. If after loss no special agreement is made, replacement of injured work shall be ordered and executed as provided for changes in the work.

The Trustee shall have power to adjust and settle any loss with the insurers unless one of the Contractors interested shall object in writing within three working days of the occurrence of loss, and thereupon arbitrators shall be chosen as above. The Trustee shall in that case make settlement with the insurers in accordance with the directions of such arbitrators, who shall also, if distribution by arbitration is required, direct such distribution.

ARTICLE 30

GUARANTY BONDS

The Owner shall have the right, prior to the signing of the Contract, to require the Contractor to furnish bond covering the faithful performance of the Contract and the payment of all obligations arising thereunder, in such form as the Owner may prescribe and with such sureties as he may approve. If such bond is required by instructions given previous to the submission of bids, the premium shall be paid by the Contractor; if subsequent thereto, it shall be paid by the Owner.

ARTICLE 31

DAMAGES

Should either party to this Contract suffer damages because of any wrongful act or neglect of the other party or of anyone employed by him, claim shall be made in writing to the party liable within a reasonable time of the first observance of such damage and not later than the final payment, except as expressly stipulated otherwise in the case of faulty work or materials, and shall be adjusted by agreement or arbitration.

ARTICLE 32

LIENS

Neither the final payment nor any part of the retained percentage shall become due until the Contractor, if required, shall deliver to the Owner a complete release of all liens arising out of this Contract, or receipts in full in lieu thereof and, if required in either case, an affidavit that so far as he has knowledge or information the releases and receipts include all the labor and material for which a lien could be filed; but the Contractor may, if any subcontractor refuses to furnish a release or receipt in full, furnish a bond satisfactory to the Owner, to indemnify him against any lien. If any lien remains unsatisfied after all payments are made, the Contractor shall refund to the Owner all moneys that the latter may be compelled to pay in discharging such a lien, including all costs and a reasonable attorney's fee.

ARTICLE 33

ASSIGNMENT

Neither party to the Contract shall assign the Contract or sublet it as a whole without the written consent of the other, nor shall the Contractor assign any moneys due or to become due to him hereunder, without the previous written consent of the Owner.

ARTICLE 34

MUTUAL RESPONSIBILITY OF CONTRACTORS

Should the Contractor cause damage to any separate contractor on the work the Contractor agrees, upon due notice, to settle with such contractor by agreement or arbitration, if he will so settle. If such separate con-

THE STANDARD FORM OF AGREEMENT BETWEEN CONTRACTOR AND OWNER FOR CONSTRUCTION OF BUILDINGS

A.I.A. DOCUMENT NO. A-101

(Formerly Form A1) 1961 Edition

Issued by The American Institute of Architects

for use when a Stipulated Sum Forms the Basis of Payment

Approved by THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA; THE CONTRACTING PLASTERERS' AND LATHERS' INTERNATIONAL ASSOCIATION; COUNCIL OF MECHANICAL SPECIALTY CONTRACTING INDUSTRIES, INC.; THE NATIONAL ASSOCIATION OF ARCHITECTURAL METAL MANUFACTURERS, THE NATIONAL BUILDING GRANITE QUARRIES ASSOCIATION, INC.; THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION; THE PAINTING AND DECORATING CONTRACTORS OF AMERICA, AND THE PRODUCERS COUNCIL, INC.

This form is to be used only with the standard general conditions of the contract for construction of buildings.

THIS AGREEMENT made the twelfth day of August

in the year Nineteen Hundred and Sixty-three by and between

Emmett C. Wade

hereinafter called the Contractor, and Dr. & Mrs. Claude G. Walker

hereinafter called the Owner,

WITNESSETH, that the Contractor and the Owner for the considerations hereinafter named agree as follows:

ARTICLE 1. SCOPE OF THE WORK

The Contractor shall furnish all of the materials and perform all of the work shown on the Drawings and described in the Specifications entitled Alterations and Repairs

3103 Georgia Avenue, N.W., Washington, D.C.

(Here insert the caption descriptive of the work as used on the Drawings and in the other Contract Documents)

prepared by L. W. Giles

acting as and in these Contract Documents entitled the Architect; and shall do everything required by this Agreement, the General Conditions of the Contract, the Specifications and the Drawings.

ARTICLE 2. TIME OF COMPLETION

The work to be performed under this Contract shall be commenced 7 days after signing of contract

and shall be substantially completed in 80 working days

(Here insert stipulation as to liquidated damages, if any.)

ARTICLE 3. THE CONTRACT SUM

The Owner shall pay the Contractor for the performance of the Contract, subject to additions and deductions provided therein, in current funds as follows: $49,995.00

(State here the lump sum amount, unit prices, or both, as desired in individual cases.)

Forty-Nine Thousand Nine Hundred Ninety Five Dollars

1. After excavation of basement, demolition on first and second floor, removal of dirt, new sewer line in, all old plumbing lines and heating lines removed, walls raised back in front of building, steel beams in place to hold heat pumps Approx. time 20 days $12,498.75
2. After all stud walls are in place and furred out, plumbing and electrical inspection, heat pumps in place and necessary duct drops through the roof. Roof covered back and front Approx. time 20 days $12,498.75
3. After closing in walls with plaster according to plans and specifications and paneling according to plans and specifications. Tile in bathrooms and treatment rooms and setting of bathroom fixtures Approx. time 20 days $12,498.75
4. Final pay. upon completion of job according to plans and specifications Approx. time 20 days $12,498.75

Where the quantities originally contemplated are so changed that application of the agreed unit price to the quantity of work performed is shown to create a hardship to the Owner or the Contractor, there shall be an equitable adjustment of the Contract to prevent such hardship.

ARTICLE 4. PROGRESS PAYMENTS

The Owner shall make payments on account of the Contract as provided therein, as follows:

On or about the ..... day of each month ..... per cent of the value, based on the Contract prices of labor and materials incorporated in the work and of materials suitably stored at the site thereof or at some other location agreed upon in writing by the parties up to the day of that month, as estimated by the Architect, less the aggregate of previous payments; and upon substantial completion of the entire work, a sum sufficient to increase the total payments to per cent of the Contract price .....

(Insert here any provision made for limiting or reducing the amount retained after the work reaches a certain stage of completion.)

ARTICLE 5. ACCEPTANCE AND FINAL PAYMENT

Final payment shall be due five (5) days after substantial completion of the work provided the work be then fully completed and the contract fully performed.

Upon receipt of written notice that the work is ready for final inspection and acceptance, the Architect shall promptly make such inspection, and when he finds the work acceptable under the Contract and the Contract fully performed he shall promptly issue a final certificate, over his own signature, stating that the work provided for in this Contract has been completed and is accepted by him under the terms and conditions thereof, and that the entire balance found to be due the Contractor, and noted in said final certificate, is due and payable.

Before issuance of final certificate the Contractor shall submit evidence satisfactory to the Architect that all payrolls, material bills, and other indebtedness connected with the work have been paid.

If after the work has been substantially completed, full completion thereof is materially delayed through no fault of the Contractor, and the Architect so certifies, the Owner shall, upon certificate of the Architect, and without terminating the Contract, make payment of the balance due for that portion of the work fully completed and accepted. Such payment shall be made under the terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

ARTICLE 6. THE CONTRACT DOCUMENTS

The General Conditions of the Contract, the Supplementary General Conditions, the Specifications and the Drawings, together with this Agreement, form the Contract, and they are as fully a part of the Contract as if hereto attached or herein repeated. The following is an enumeration of the Specifications and Drawings:

All consultations and waiting rooms shall be panelled in white oak.
All bathrooms and treatment rooms shall have ceramic tile 42" high.
Entrance shall have ceramic tile to the top of the first floor level.
Drop ceiling in first floor waiting room only.

IN WITNESS WHEREOF the parties hereto have executed this Agreement, the day and year first above written.

CONTRACTOR Emmett H. Wade OWNER Dr. Louis Gilliam

DATE 12 August 63 OWNER Mrs. Josephine Wi

JA 107

[PLAINTIFF'S EXHIBIT 4]

EMMETT C. WADE
General Contractor
1914 Newton Street, N. E.
Washington, D. C.
LAwrence 6-6033

To: Dr. & Mrs. Claude G. Walker
3130 Georgia Avenue, N. W.
Washington, D. C.

Date: 20 February 1964

Job: 3130 Georgia Ave., N. W.

REQUEST FOR PAYMENT FOR EXTRAS:

1.	Completion Bond to Suburban Lumber Co.	$1,000.00
2.	Lawyers fee for Deed of Trust	50.00
3.	Metal Door bucks for all interior doors	687.00
4.	Ply score to cover all floors	345.00
5.	Ceiling translucent paneling in basement	56.00
6.	Extra wall not shown on plans, front room in basement made into two (2) rooms, put in hallway in basement, put in hallway on first floor, change front room in dental office	300.00
7.	Extra cost of glass over original price given by Hyes Turner	800.00
8.	Intercom system	250.00
9.	Three sheets of oak paneling in Dental Office	40.00
10.	Cost of hardware over the $200.00 allowance	204.00
11.	Electric contactors and relays for 6 heat boosters	156.00
12.	Plumbing for two Dental operatories and a dental lab	600.00
13.	Electric lines for two dental units, X-ray lab, and autoclave	75.00
14.	Moving Electric service from entrance to basement wall and braker panel on each floor	200.00
15.	Cost of electric fixtures over the $500.00 allowance	500.00
	Total	$5,263.00

The cost of extras to be taken back by the contractor nad secured by a Deed of Trust Note from the Owners.

DATE_____

_____
Emmett C. Wade, Contractor

ACCEPTED_____

ACCEPTED_____

[PLAINTIFF'S EXHIBIT 7]

[Filed SEP 28 1965]

Hires Turner Glass Company
825 Slaters Lane, Alexandria, Virginia

March 2, 1964

Dr. Claude G. Walker
3103 Georgia Avenue N. W.
Washington D. C.

RE: Thinlite Panel Construction
Your wire March 1, 1964

Dear Doctor:

With reference to your wire regarding our contract proposal to Mr. Emmitt Wade, to date we have not received the letter requested of Suburban Lumberteria, Inc., by us on instruction from Mr. Wade.

Both Mr. Wade and Mr. Lewis Good Jr. of Suburban Lumberteria, Inc., were advised that the processing of the order was dependent on receipt of letter from agent indicating availability of funds for the material and lumber covered by our proposal.

It is regretted that circumstances beyond our control prevented the completion of your job prior to Christmas as desired by you, but even early in December this was impossible as the factory requires seven to eight weeks after completion of drawings to ship the materials. We feel that prompt notice was given those concerned of our requirement and no reply has yet been received.

Very truly yours
HIRES TURNER GLASS COMPANY

/s/ E. A. Jarvis, Manager

EAJ/ahp

SUPPLEMENTAL JOINT APPENDIX
No. 19,736

PLAINTIFF'S EXHIBIT 5

STATEMENT COPY
APpleton 7-1455
UNion 4-5575

DOORS · SASH
BLINDS · WINDOWS
CABINETS
MILLWORK
BUILDER'S HARDWARE

SUBURBAN LUMBERTERIA Inc.

LUMBER · MILLWORK · BUILDING SUPPLIES

4109 FORTY SIXTH STREET — BLADENSBURG, MARYLAND

Customer's Order No.

Date 1/23 19 64

Sold to Emmett Wade

Address 3103 Georgia Ave

Contract or Job

PLAINTIFF'S EXHIBIT 52

✓	QUANTITY	DESCRIPTION	PRICE	AMOUNT
	4	64 X 58 awning Windows		249 60
	11	64 x 120 awning Windows		78 75
		upstairs sizes include per Picture Window		
		See mullions		16 80
		Picture Window		15 33
		Order by Balsar Lobue		
		D. C. SALES TAX	Total	360 48
			Sales Tax	10 82
			Total	371 30

DRIVER | TALLYMAN

All delivered prices are for street curb delivery except where the curb and sidewalk are entirely bridged and protected and a good road provided to actual point of unloading inside of curb. We will assume no responsibility for any damages whose delivery is made inside of curb. A charge of 10% will be made on material returned.

No. F 4032 | Received by

ALL CLAIMS OF ANY NATURE MUST BE MADE WITHIN THREE DAYS

Supp. JA 1

[Plaintiff's Exhibit 6, continued]

Bldg. No.

Certificate No. 3

Contract Price, $ 49,995.00

Extra Work - $ —

Total - - $ —

Deduction - $ —

Balance - - $ —

Former Certificates $ 24,997.50

Present Certificate $ 12,498.75

Total - - $ 37,496.25

Balance - - $ 12,498.75

$ 12,498 75/100

DECEMBER 19 1963

To INDUSTRIAL BANK OF WASHINGTON

This is to Certify, That EMMETT C. WADE

Contractor for the GENERAL CONTRACT of your building 3103 GEORGIA AVE. N.W.

———— is entitled to a —— payment of TWELVE THOUSAND FOUR HUNDRED NINTY EIGHT + ———— 75/100 Dollars, by the terms of contract.

R. C. Archer Jr.
Architect

Remarks: DR. & MRS. CLARENCE G. WALKER, OWNERS

SUPP. JA 3

C & K P 792

Issued 12/20/63 To Emmett C. Wade, Contractor & Suburban Lumber-Teria, Inc.

PLAINTIFF'S EXHIBIT 6

Pd. 11/21/63

Bldg. No.	
Certificate No.	Two
Contract Price,	$49,995.00
Extra Work -	$ -----
Total - -	$ ------
Deduction -	$
Balance - -	$ -----
Former Certificates	$ 12,498.75
Present Certificate	$ 12,498.75
Total - -	$ 24,997.50
Balance - -	$ 24,998.50

$ 12,498.75 /100

November 21,1963 19

To Industrial Bank of Washington,

This is to Certify, That Emmett C.Wade

Contractor for the General Contract of your

building 5103 Georgia Ave., N.W. Washington, D.C.

------------ is entitled to a ------- payment of ---------

Twelve thousand, four hundred ninty eight and 75/100 ------ **Dollars,**

by the terms of contract. [illegible signature]

Architect

Remarks: Dr. and Mrs Claude Walker, Owners.

PUBLISHED BY EUGENE DIETZGEN CO. CHICAGO NEW YORK NEW ORLEANS MILWAUKEE SAN FRANCISCO LOS ANGELES PITTSBURGH PHILADELPHIA WASHINGTON

EMMETT C. WADE

Bldg. No.	
Certificate No.	1
Contract Price,	$ [illegible]
Extra Work -	$
Total - -	$
Deduction -	$
Balance - -	$
Former Certificates	$ --
Present Certificate	$ [illegible]
Total - -	$ [illegible]
Balance - -	$ [illegible]

$ 49,495 [illegible] /100

Oct. 28 1963

To Industrial Bank of Washington

This is to Certify, That Emmett Wade (Gen. [illegible])

Contractor for the General Contract of your

building [illegible] Georgia Ave. N.W. Washington, DC

is entitled to a -- payment of Twelve Thousand

Four hundred ninty eight ---------- 75/100 **Dollars,**

by the terms of contract. [illegible signature]

Architect

Remarks: [illegible] 2nd Floor [illegible] completed

[illegible] check issued

PUBLISHED BY EUGENE DIETZGEN CO. CHICAGO NEW YORK NEW ORLEANS MILWAUKEE SAN FRANCISCO LOS ANGELES PITTSBURGH PHILADELPHIA WASHINGTON

Paid 10/25/63

Supp. JA 4

INDUSTRIAL BANK OF WASHINGTON

2000 - 11TH STREET, N. W.
WASHINGTON 1, D. C.

PHONE: 332-9200

PETWORTH BRANCH
4812 GEORGIA AVENUE, N. W.
WASHINGTON 11, D. C.

PLAINTIFF'S EXHIBIT 7

PLAINTIFF'S EXHIBIT 7 Revised

May 23, 1963

FILED
SEP 27 1965
HARRY M. HULL, Clerk

Dr. Claude Gilmore Walker
1340 Girard St., N. W.
Washington, D. C.

Dear Sir:

We have approved a loan of $50,000.00 to you and your wife to be secured by a first deed of trust on lot 110 in square 3047, premises 3103 Georgia Avenue, N. W. in this City for the completion of the renovation upon the following conditions:

1. That a release of liens be supplied for work already done.
2. The payments will be $400.00 per month with the first payment coming due 30 days after the estimated time of completion of work with the balance, if any, coming due 10 years after the date of the note.
3. A schedule of draws for the contractor to be submitted to the Bank and each draw to be approved by Mr. R. C. Archer, an architect of 215 Florida Ave., N. W. in this City at your expense.
4. A charge of 2 points or $1,000.00 to be paid to our Bank out of the third draw.
5. Interest on loan will be 6% per annum on reducing balances.
6. An insured title will be required of the title company.
7. A fire insurance policy on the building at least $50,000.00 to be placed by us at your expense.

If the terms are acceptable to you, kindly sign and also have your wife sign the enclosed copy of this letter and return to us immediately. Upon receipt of your approval we shall order title right away.

We thank you for this opportunity to be of service to you.

Very truly yours,

B. Doyle Mitchell

B. Doyle Mitchell, President

Enclosure

Terms approved:

Dr. Claude Gilmore Walker MD

Dr. Claude Gilmore Walker

Maude Josephine Walker

Wife's signature

36417

Deed of Trust

BOOK 12100 PAGE 453

Nov 6 3 38 PM '63

PLAINTIFF'S EXHIBIT 8

This Deed

Made this 28th *day of* October, *A.D. 19* 63 *, by and between*

Claude Walker and Maude J. Walker, also known on record as

FILED

SEP 27 1965

HARRY M. HULL, Clerk

Claude Gilrore Walker and his wife, Maude Josephine Walker *parties of the first part, and*

Allan E. Atkinson and Nadell B. Thomas, Trustees, parties *of the second part:*

Whereas, Claude Gilmore Walker and Maude Josephine Walker are

justly indebted to the Industrial Bank of Washington *in the full sum of* Fifty Thousand and no/100 *Dollars* loaned *with interest until paid, at the rate of* six *per centum per annum, for ~~defrayed purchase~~ money for which amount the said parties of the first part have executed and delivered* their *promissory note bearing even date with these presents, payable to* the said Industrial Bank of Washington *said principal and interest payable* $ 400.00 *per month (with the full privilege of making larger payments in any amount) on the* 28th *day of each and every month after date until paid. Each installment when so paid to be applied first to the payment of the interest on the amount of the principal remaining unpaid and the balance thereof credited to the principal. Default in any install-*

Supp. JA 6

ment or prior lien or encumbrance or taxes or assessments on the hereinafter described property when the same become due and payable shall cause all remaining unpaid installments to immediately become due and payable at the option of the holder of the aforesaid note, anything herein contained to the contrary notwithstanding.
Said note has been identified by the Notary Public taking the acknowledgment to these presents.
Said monthly payments to commence January 28, 1964 with the entire balance thereof, if any, becoming due and payable October 28, 1973.

And Whereas, *the parties of the first part desire to secure the prompt payment of said debt, and interest thereon, when and as the same shall become due and payable, and all costs and expenses incurred in respect thereto, together with all taxes and insurance premiums as well as all renewals or extensions of said debt, including reasonable counsel fees incurred or paid by the said part ies of the second part or substituted trustee or by any person hereby secured, on account of any litigation at law or in equity which may arise in respect to this trust or the property hereinafter mentioned, and of all money which may be advanced as provided herein, with interest on all such costs and advances from the date thereof.*

Now Therefore, This Indenture Witnesseth, that the part ies of the first part, in consideration of the premises, and of one dollar, lawful money of the United States of America, to have ' in hand paid by the part ies of the second part, the receipt of which, before the sealing and delivery of these presents, is hereby acknowledged, ha vegranted, and do hereby grant unto the part ies of the second part

Supp. JA 7

BOOK PAGE

12100 454 [Plaintiff's Exhibit 8, continued]

the following described land and premises, situated in the District of Columbia, known and distinguished as Lot numbered One Hundred Ten (110) in Carl William Schmidt and Carlos P. Williams' subdivision in Block numbered Three (3), "Scheutzen Park", as per plat recorded in the Office of the Surveyor for the District of Columbia in Liber 46 at folio 103.

Said property being now known for assessment and taxation purposes as Lot numbered One Hundred Ten (110) in Square numbered Thirty Hundred Forty-seven (3047).

together with all the improvements in anywise appertaining, and all the estate, right, title, interest and claim, either at law or in equity, or otherwise however, of the part ies of the first part, of, in, to, or out of the said land and premises.

In and Upon the Trusts, Nevertheless, hereinafter described; that is to say: IN TRUST to permit said parties of the first part, heirs or assigns, to use and occupy the said described land and premises, and the rents, issues and profits thereof, to take, have, and apply to and for their sole use and benefit, until default be made in the payment of the said note hereby secured or any installment of interest thereon, when and as the same shall become due and payable, or any proper cost, tax, or expense in and about the same as herein provided.

And, upon the full payment of all of said note and the interest thereon, and all moneys advanced or expended as herein provided, and all other proper costs, counsel fees, charges, commissions, half-commissions and expenses, at any time before the sale herein provided for to release and reconvey the said described premises unto the said parties of the first part, heirs or assigns, at their cost.

Supp. JA 8

And Upon This Further Trust, *upon any default or failure being made in the payment of* that one *note or any installment of principal or interest thereon, or upon default in payment, on demand, of any sum or sums advanced by the holder or holders of said note on account of any costs, counsel fees and expenses of this Trust, or on account of any such tax or assessment, or insurance or expense of litigation, or on account of any lien, Deed of Trust or Mortgage on said land and premises, prior in lien to this Trust, with interest thereon at six per centum per annum from date of advance (it being hereby agreed that on default in payment of said costs, expenses, tax or assessment, or insurance, or expense of litigation, or such prior lien, Deed of Trust or Mortgage as aforesaid, the same may be paid by the holder or holders of said note and all sums advanced in so doing, with interest as aforesaid, shall forthwith attach as a lien hereunder and be demandable at any time); then, upon any and every such default so made as aforesaid, the said part* ies *of the second part,* the survivor of them, substituted trustee *or the trustee acting in the execution of this trust shall have the power and it shall be* their *or his duty thereafter to sell, and in case of any default of any purchaser to resell the said described land and premises at public auction, upon such terms and conditions, in such parcels, at such time*

Supp. JA 9

[Plaintiff's Exhibit 8, continued]

and place, and after such previous public advertisement as the parties of the second part, the survivor of them, substituted trustee or the trustee acting in the execution of this trust shall deem advantageous and proper; and to convey the same in fee simple, upon compliance with the terms of sale, to, and at the cost, of the purchaser, or purchasers thereof, who shall not be required to see to the application of the purchase money; and of the proceeds of said sale or sales: FIRSTLY, to pay all proper costs, charges, and expenses, including all counsel fees and costs herein provided for, and all moneys advanced for taxes, insurance, and assessments, with interest thereon as provided herein, and all taxes, general and special, due upon said land and premises at time of sale, and to retain as compensation a commission of five per centum on the amount of the said sale or sales; SECONDLY, to pay whatever may then remain unpaid of said note whether the same shall be due or not, and the interest thereon to date of payment, it being agreed that said note shall, upon such sale being made before the maturity of said note , be and become immediately due and payable at the election of the holder thereof; and, LASTLY, to pay the remainder of said proceeds, if any there be, to said parties of the first part heirs or assigns, upon the delivery and surrender to the purchaser, his, her or their heirs or assigns, of possession of the premises so as aforesaid sold and conveyed, less the expense, if any, of obtaining possession.

And, the said parties of the first part do hereby agree at their own cost, during all the time wherein any part of the matter hereby secured shall be unsettled or unpaid to keep the said improvements insured against loss by fire in the full sum of fifty thousand and no/100 dollars, in the

Supp. JA 10

name and to the satisfaction of the part ies *of the second part, or substituted trustee, in such fire insurance company or companies as the said part* ies *of the second part may select, who shall apply whatever may be received therefrom (whether by return short rate unearned premiums after foreclosure or otherwise) to the payment of the matter hereby secured, whether due or not, unless the party entitled to receive shall waive the right to have the same so applied; and also to pay all taxes and assessments, both general and special, that may be assessed against, or become due on said land and premises during the continuance of this trust and that upon any neglect or default to so insure, or to pay taxes and assessments, any party hereby secured may have said improvements insured and pay said taxes and assessments, and the expenses thereof shall be a charge hereby secured and bear interest at the rate of six per centum per annum from the time of such payment.*

And, *it is further agreed that if the said property shall be advertised for sale, as herein provided, and not sold, the trustee or trustees acting shall be entitled to one-half the commission above provided, to be computed on the amount of the debt hereby secured.*

And *the said part* ies *of the first part covenant that* they *will warrant specially the land and premises hereby conveyed, and that* they *will execute such further assurances of said land as may be requisite or necessary.*

In Witness Whereof, *the said parties of the first part have hereunto set* their *hands and seals on the day and year first hereinbefore written.*

Signed, sealed and delivered in the presence of—

[SEAL]

[SEAL]

[SEAL]

Supp. JA 11

[Plaintiff's Exhibit 8, continued]

BOOK 2100 PAGE 456

United States of America

District of Columbia, to wit:

I, [signature] a Notary Public in and for the District of Columbia, DO HEREBY CERTIFY that Claude Gilmore Walker and Maude Josephine Walker

parties to a certain Deed bearing date on the 29th day of October, A. D. 19 63, and hereunto annexed, personally appeared before me, in said District, the said Claude Gilmore Walker and Maude Josephine Walker

[illegible] personally well known to me as the person s who executed the said Deed, and acknowledged the same to be their act and deed.

Given under my hand and seal this 29 day of October, A. D. 1963

[signature]

Supp. JA 12

Deed of Trust

D.C.

•36417 — IRS

FILED
NOV-6-63 2 34 65 SEP 23 1963
HARRY M. HULL, Clerk

Claude Gilmore Walker

Maude Josephine Walker

TO

Allan E. Atkinson

Wadell R. Thomas

Trustee.

Received for Record on the _____ day of _____, A.D. 19__, at _____ o'clock ___M, and recorded in Liber No. 12102 at Folio 453, one of the Land Records for the District of Columbia, and examined by

Ridley

Recorder.

Mail to: Allen J. Ridley

Industrial Bank of Washington,
4812 Georgia Avenue, N. W.,
Washington, D. C.

[Plaintiff's Exhibit 8, continued]

W.P.C. 30393-F

Supp. JA 14

PLAINTIFF'S EXHIBIT 9

EMMETT C. WADE
General Contractor
1914 Newton Street, N.E.
Washington, D. C. 20018
Lawrence 6-6033

To: Dr. & Mrs. Claude G. Walker
1340 Girard Street, N. W.
Washington, D. C.

Date: 17 February 1964

Job: 3103 Georgia Ave.,
N. W., Washington, D. C.

REQUEST FOR PAYMENT:

Final pay upon completion of job according to plans and specifications
$12,498.75

Sincerely yours,

Emmett C. Wade, Contractor

Not Paid Yet

Claude G. Walker MD

PLAINTIFF'S EXHIBIT 10

Bldg. No.

Certificate No. Four

Contract Price, $49,995.00

Extra Work - $ -------

Total - - $

Deduction - $

Balance - - $

Former Certificates $ 37,496.25

Present Certificate $ 12,498.75

Total - - $ 49,995.00

Balance - - $ 00,000.00

$12,498.75

FILED

February 18th, 1964 19

To Industrial Bank of Washington MAR 27 1935

PLAINTIFF'S EXHIBIT 10

This is to Certify, That Harry Emmett C. Wade HULL, Clerk

Contractor for the General contract of your building 3109 Georgia Ave., N.W. Washington, D.C.

is entitled to Final payment of Twelve thousand, Four hundred ninty eight dollars and seventy five cents Dollars, by the terms of contract.

Remarks: Final payment.

Approved by Owner

Architect

PUBLISHED BY BUSINESS STATIONERY CO. CHICAGO NEW YORK NEW ORLEANS MILWAUKEE SAN FRANCISCO LOS ANGELES PITTSBURGH PHILADELPHIA WASHINGTON

Supp. JA 15

DEFENDANT'S EXHIBIT 2

FORM 1255-S REV. 9-1-55

Trusik

PITTSBURGH PLATE GLASS COMPANY

1646 New York Avenue, N. E.
WASHINGTON 2, D. C.

PROPOSAL
#548

12/17/63

Emmett C. Wade
1914 Newton St., N.E.
Washington, D. C.

[redacted]

WE PROPOSE TO FURNISH AND INSTALL MATERIALS AS PER SPECIFICATIONS BELOW

FOR Office Bldg.

TO BE ERECTED AT 3103 Ga. Ave., N.W.

AS PER PLAN NO. Job CONSISTING OF SHEETS

AND SPECIFICATIONS DATED

DATED

AND ADDENDA DATED

PREPARED BY Job ARCHITECT

FOR THE SUM OF Eight Hundred Five and 76/100----------DOLLARS (NET CASH)

$ 805.76
(WHERE SALES TAX IS APPLICABLE, SAID TAX IS INCLUDED IN ABOVE PRICE)

Deliver only:

156 pcs. - 12" Decora glass blocks
144 pcs. - Intaglio #I glass blocks
80 pcs. - Intaglio #IV glass blocks

THIS PROPOSAL IS SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS AND ALSO TO CONDITIONS SHOWN ON REVERSE SIDE HEREOF.

1. Work will be executed as promptly as possible if contract is awarded us, subject to delays occasioned by strikes, lock-outs, fires, carriers' delay and other causes beyond our control.
2. We do not replace at our expense breakage or damaged glass, metal and other materials unless caused directly by our own employees.
3. We do not clean any glass, metal construction or spandrels.
4. This proposal is subject to revision if, during the final detailing of sash, metal construction or other openings, sizes of glass or metal are changed from those shown on drawings on which this proposal is based.
5. We reserve the right to correct clerical errors notwithstanding prior acceptance. If the error is one of substance rather than form, and acceptance of the proposal occurs before its correction, such acceptance may be withdrawn if correction renders the proposal unacceptable.
6. This proposal is subject to revision or withdrawal if not accepted within 10 days after date.
7. All materials will be furnished in accordance with industry-established tolerances on color variation, thickness, size, finish, texture and performance standards.
8. When contract involves re-use of owner's materials, such materials will be handled at owner's risk.
9. We assume no responsibility for the formation of condensation or frost on glass and metal because of their numerous and uncontrollable sources.
10. We assume no responsibility for stains or corrosion which may occur on metal construction after installation.
11. This proposal is based on all work being performed during regular working hours. Extra charge will be made for all overtime work.
12. This proposal, if accepted, is subject to the approval of our Credit Department.
13. Changes or extra work must be evidenced by written orders.

TERMS: *Progress payment consisting of 90% of value of all materials delivered to job site and work performed during the month is to be paid us on or before the 10th of the following month. Balance in full upon completion of this contract.*

We invite your early acceptance of this proposal.

Accepted [signature]
.....
Date Dec. 19 19 63

Respectfully submitted,
PITTSBURGH PLATE GLASS COMPANY
By [signature]
Richard A. Crawford
Contract Manager

Supp. JA 17

[Defendant's Exhibit 2 (reverse side)]

CONDITIONS

PRO RATA CHARGE

We do not assume any charge for use of telephone, plaster patching, general cleaning, general office expense, stenographic fees, electric light, insurance, watchman's services or temporary structures, nor pro rated charges of any description including liquidated damages. We agree to remove our own rubbish and will not assume any charge for removal by others unless authorized by us.

SASH GLAZING

The setting of glass in sash requiring glass to be set from outside of building from a swing stage, or other apparatus is to be done after all sash are set complete in their respective openings. The glazing is to be done in bays or tiers the full height of the building.

STRUCTURAL AND PREPARATORY WORK BY OTHERS

It is essential that all framing and masonry pertinent to our work be erected plumb and straight and in exact accordance with working details and specifications either prepared or approved by us. Any changes necessitating alterations or extra material not included in proposal shall be charged for accordingly. Furnishing and complete erection of framing and masonry for the reception of our materials is to be done by others.

AUXILIARY FACILITIES AND STORAGE SPACE

We are to be afforded use of hoist during regular working hours for transportation of our material. No charge is to be made for our employees using temporary elevators or other conveyance. It is understood that we are to be provided with suitable space on job site for storage of materials without any charge. If scaffolding is necessary it shall be furnished by owner or others.

ARBITRATION

Any disputes or differences shall be subject to arbitration in accordance with A.I.A. rules and procedures, if desired by either party to contract.

FEES AND BACKCHARGES

No fees, charges, expenses or claim for property damage in connection with the performance of this contract will be honored unless advance approval in writing is obtained from us.

WEATHER CONDITIONS

We shall not be required to install our materials under unfavorable weather conditions as defined in manufacturer's instructions or as determined by accepted practices, unless protection and heat are supplied by others to bring conditions within accepted limitations.

[This page left blank in order most efficiently to accommodate exhibit pages which follow]

[Defendant's Exhibit 2, continued]

FORM 1253-B REV. 8-1-59

Trusik

PITTSBURGH PLATE GLASS COMPANY

1545 New York Avenue, N. E.
WASHINGTON 2, D. C.

PROPOSAL
#547

12/17/63

Ernett C. Wade
1914 Newton St., N.E.
Washington, D. C.

WE PROPOSE TO FURNISH AND INSTALL MATERIALS AS PER SPECIFICATIONS BELOW

FOR Office Bldg. 3103 Ga. Ave., N. W.

TO BE ERECTED AT

AS PER PLAN NO. Job **CONSISTING OF SHEETS**

DATED **AND SPECIFICATIONS DATED**

AND ADDENDA DATED

PREPARED BY Job sizes **ARCHITECT**

FOR THE SUM OF One Thousand Fifty-Six and no/100----------**DOLLARS (NET CASH)**

$ 1,056.00
(WHERE SALES TAX IS APPLICABLE, SAID TAX IS INCLUDED IN ABOVE PRICE)

To furnish and install
1/4" P.P. 2 pcs. 32 x 78 - door glass
1 pc 60 x 120 - set with #70 sash

Supp. JA 20

1/4" Misco Wire
4 pcs. 48 x 60 - set with #70 sash
1 pc. 36 x 48 - set with #70 sash

1 pair Tubelite 3/0 x 7/0 Tubelite doors and
6/4 x 7/2 frame complete with overhead
closers, lock, bolt, push pull bar & threshold.

THIS PROPOSAL IS SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS AND ALSO TO CONDITIONS SHOWN ON REVERSE SIDE HEREOF.

1. Work will be executed as promptly as possible if contract is awarded us, subject to delays occasioned by strikes, lock-outs, fires, carriers' delay and other causes beyond our control.
2. We do not replace at our expense breakage or damaged glass, metal and other materials unless caused directly by our own employees.
3. We do not clean any glass, metal construction or spandrels.
4. This proposal is subject to revision if, during the final detailing of sash, metal construction or other openings, sizes of glass or metal are changed from those shown on drawings on which this proposal is based.
5. We reserve the right to correct clerical errors notwithstanding prior acceptance. If the error is one of substance rather than form, and acceptance of the proposal occurs before its correction, such acceptance may be withdrawn if correction renders the proposal unacceptable.
6. This proposal is subject to revision or withdrawal if not accepted within 10 days after date.
7. All materials will be furnished in accordance with industry-established tolerances on color variation, thickness, size, finish, texture and performance standards.
8. When contract involves re-use of owner's materials, such materials will be handled at owner's risk.
9. We assume no responsibility for the formation of condensation or frost on glass and metal because of their numerous and uncontrollable sources.
10. We assume no responsibility for stains or corrosion which may occur on metal construction after installation.
11. This proposal is based on all work being performed during regular working hours. Extra charge will be made for all overtime work.
12. This proposal, if accepted, is subject to the approval of our Credit Department.
13. Changes or extra work must be evidenced by written orders.

TERMS: *Progress payments consisting of 90% of value of all materials delivered to job site and work performed during the month to be paid us on or before the 10th of the following month. Balance in full upon completion of this contract.*

We invite your early acceptance of this proposal.

Accepted E. H. Wade

.....

Date Dec. 19 19 63

Respectfully submitted,
PITTSBURGH PLATE GLASS COMPANY
By Richard A. Crawford
Contract Manager

* * *

[Reverse of this page same as Supp. JA 18]

Supp. JA 21

DEFENDANT'S EXHIBIT 3

Hires Turner Glass Company

Glass • Mirrors • Store Fronts • Glazing

P. O. BOX 2145 ALEXANDRIA, VA.

Founded 1908

Phone 548-6864

E. A. JARVIS
Manager

PROPOSAL

Emmett C. Wade
1914 Newton Street, N. E.
Washington, D. C.

November 29, 1963

1492 - 63

We propose to furnish and glaze or install all the glass and/or other material listed below required.

FOR: Dr. Claude Walker Medical Building

TO BE ERECTED AT 3103 Georgia Avenue, N. W, Washington, D. C.

According to Plan No. Consisting of Sheets

Dated and specifications dated

Prepared by Architect

Unless modified below, for the sum of Two Thousand Seven Hundred Dollars.....$2,700.00

Furnish Only two aluminum door bucks for interior wood doors.

Furnish and Install:

2 opg. 6'0" x 4'0" Thinlite Panel Green Solar Selecting
7 opg. 4'0" x 4'0" Same
3 opg. 4'0" x 4'0" Thinlite Panel White Solar Selecting
4 opg. 5'0" x 4'0" Thinlite Panel Green Solar Selecting
2 opg. 4'0" x 2'0" Thinlite Panel Yellow Solar Selecting

1 opg. 5'0" x 10'0" Thinlite Panel Green Solar Selecting with 3 sections of Ventilating Winaows, 1 Pr. 5'0" x 7'0" Narrow Stile Aluminum Doors & Frames with Standard Hardware.
Particular attention is called to the fact that this estimate DOES NOT INCLUDE WASHINGT OR CLEANING of any glass or other material, NOR THE REPLACING OF BREAKAGES Or other damages after installation has been made by us, although included in the glass and glazing plans and specifications.

THIS PROPOSAL IS MADE SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS AND THOSE SHOWN ON THE REVERSE SIDE HEREOF:

1. The prompt execution of this work, if contract is awarded us, will be subject to delays occasioned by strikes, lock-outs, fires, carriers and other causes beyond our control, including obstruction or delay by any act, neglect, delay, or default of the owner or the architect or of any other contractor employed by the owner or the architect or the general contractor upon the work.
2. Unless otherwise noted herein, it is based upon using putty of the kind, color, and quality as called for in the specifications for glazing either wood sash, steel sash, or casement sash, and in the absence of such specifications we will use standard putty of our own choosing considered by us as suitable for the work.
3. It does not include the furnishing or glazing of any vault, side-walk or sky-light glass.
4. We do not replace breakage or damaged glass and/or such other material furnished by us, caused directly or indirectly by any trade or workmen on the building, nor replacing of any breakage occurring after the glass and/or such other material furnished by us, is once set sound and whole, other than breakage caused by our own men. You are to provide all the insurance necessary for complete coverage of all material and labor cost for installation furnished by us.
5. We do not prime or oil any sash, nor do we clean any glass, sash, or metal store front construction.
6. Clerical errors are subject to correction prior to acceptance and all estimates and contracts are subject to approval and acceptance by the signature of a duly authorized executive officer of the company. This proposal is subject to revision or withdrawal 10 days after date hereof, if not accepted in writing prior to that time. Work is to be done as soon as possible or within a reasonable time and is based on all work being performed during regular working hours. Extra charge will be made for all overtime work.

TERMS: Payments to be made as follows upon approved credit:
90% of the price of all material furnished and labor performed by us during any calendar month is to be paid us on or before the 10th of the following month. Balance of 10% in full thirty days after completion of our contract. NO CASH DISCOUNTS ALLOWED.

We solicit your early acceptance of this proposal, in which event we promise to give the work our most careful attention.

Very truly yours,

Accepted .....

.....

.....

Date .....

HIRES TURNER GLASS COMPANY

BY
W. A. Foley
Contract Department

Distributors—LIBBEY • OWENS • FORD Quality GLASS PRODUCTS

* * *

[Reverse of this page same as Supp. JA 18]

FORM 604 REV. 11-60

PITTSBURGH PLATE GLASS COMPANY 604

13

REGISTER NUMBER 11526

1948 NEW YORK AVENUE, N. E.
WASHINGTON 2, D. C.

TERMS

ALL GLASS PRODUCTS — 1% 10 DAYS / 30 DAYS NET

LINSEED OIL, TURPENTINE, ALCOHOL & SHELLACS — 1% 10 DAYS / 30 DAYS NET

PAINTS, VARNISHES, PAINTERS SUNDRIES AND SUPPLIES — 1% 10 DAYS / 30 DAYS NET

Emmett C. Wade
1914 Newton Street, N. E.
Washington, D. C.

DATE OF ORDER

YOUR ORDER No.

Ship to Office Building
3103 Ga. Avenue, N. W.

Via

DATE OF INVOICE 1-23-64

DATE SHIPPED 1-22-64

F. O. B.

FILED

SEP 27 1965

HARRY M. HULL, Clerk

QUANTITY	DESCRIPTION	
132 Pcs.	12" Essex Glass Block	$333.96
	Plus D. C. Tax	10.02
		343.98

$343.98

DEFENDANT'S EXHIBIT 4

We hereby certify that these goods were produced in compliance with all applicable requirements of sections 6, 7, and 12 of the Fair Labor Standards Act, as amended, and of regulations and orders of the United States Department of Labor issued under section 14 thereof.

ALL PURCHASERS OF PPG GLASS OR PAINT FOR RESALE ARE ELIGIBLE TO BE IDENTIFIED AS PPG PRODUCT DEALERS. ALL CURRENT PROMOTIONAL AIDS ARE AVAILABLE THROUGH YOUR PPG BRANCH.

Supp. JA 24

FORM 504 REV. 11-60

TERMS

ALL GLASS PRODUCTS — 1% 10 DAYS / 30 DAYS NET

LINSEED OIL, TURPENTINE, ALCOHOL & SHELLACS — 1% 10 DAYS / 30 DAYS NET

PAINTS, SUNDRIES, PAINTER SUNDRIES AND SUPPLIES — 1% 10 DAYS / 30 DAYS NET

DATE OF ORDER

YOUR ORDER No.

PITTSBURGH PLATE GLASS COMPANY 604

REGISTER NUMBER 10275

1948 NEW YORK AVENUE, N. E.
WASHINGTON 2, D. C.

Emmett C. Wade
1014 Newton Street, N. E.
Washington, D. C.

DATE OF INVOICE Jan. 7, 1964

DATE SHIPPED Jan. 7, 1964

F. O. B.

Ship to Waiting

Via

QUANTITY	DESCRIPTION	
	Pittco Metal	
4 pieces #755 8' 6"		
	34' @ $2.06	$70.04
	D. C. Sales Tax	2.10
		72.14

[Defendant's Exhibit 4, continued]

We hereby certify that these goods were produced in compliance with all applicable requirements of sections 6, 7, and 12 of the Fair Labor Standards Act, as amended, and of regulations and orders of the United States Department of Labor issued under section 14 thereof.

ALL PURCHASERS OF PPG GLASS OR PAINT FOR RESALE ARE ELIGIBLE TO BE IDENTIFIED AS PPG PRODUCT DEALERS. ALL CURRENT PROMOTIONAL AIDS ARE AVAILABLE THROUGH YOUR PPG BRANCH.

Supp. JA 25

15

FORM 604 REV. 11-60

TERMS

ALL GLASS PRODUCTS	1% 10 DAYS / 30 DAYS NET
LINSEED OIL TURPENTINE ALCOHOL & SHELLACS	1% 10 DAYS / 30 DAYS NET
PAINTS, BRUSHES, PAINTER SUNDRIES AND SUPPLIES	1% 10 DAYS / 60 DAYS NET

PITTSBURGH PLATE GLASS COMPANY 604

REGISTER NUMBER 09850

1848 NEW YORK AVENUE, N. E.
WASHINGTON 2, D. C.

Emmett C. Wade
1914 New ton St. N. E.
Washington, D. C.

12-19-63
DATE OF INVOICE

12-27-63
DATE SHIPPED

DATE OF ORDER

YOUR ORDER No. Ship to Will Call For: Via F. O. B.
3103 Ga. Avenue, N. W.

QUANTITY	DESCRIPTION	
52 Cnts. 12" Decora Glass Block		
	56 Pcs. @ $263	$394.68
	D. C. Tax	11.85
		406.53

[Defendant's Exhibit 4, continued]

We hereby certify that these goods were produced in compliance with all applicable requirements of sections 6, 7, and 12 of the Fair Labor Standards Act, as amended, and of regulations and orders of the United States Department of Labor issued under section 14 thereof.

ALL PURCHASERS OF PPG GLASS OR PAINT FOR RESALE ARE ELIGIBLE TO BE IDENTIFIED AS PPG PRODUCT DEALERS. ALL CURRENT PROMOTIONAL AIDS ARE AVAILABLE THROUGH YOUR PPG BRANCH.

Supp. JA 26

FROM Robert Dobson
834 7th ST NE

DEFENDANT'S EXHIBIT 5

TO Emmett C. Wade — Dec 27 — 1963

ADDRESS 3103 Georgia Ave NW — ORDER NO.

CITY Washington DC — STATE — TERMS

1	laying glass Block at 3103 Georgia Ave Washington DC 17 opening	$500 00
	Robert Dobson	$500 00

GAYLORD FORM S1646

FROM HURSTON KENT
421- Marietta St. NW

TO EMETT C WADE — Jan 31 1964

ADDRESS 3103 Ga Ave NW — ORDER NO.

CITY — STATE — TERMS

	INSTALLAT Glass Windows 3103 Ga Ave	96 00
	Hurston Kent	96 00

GAYLORD FORM S1646

HUdson 3-7900

DISTRICT GLASS COMPANY

[Defendant's Exhibit 5, continued]

GLASS for ALL PURPOSES — PROMPT REPLACEMENT SERVICE

1535 SEVENTH STREET, N. W. — February 7, 1964 — WASHINGTON 1, D. C.

INVOICE TO

Mr. Emmit Wade
1914 Newton Street, N.E.
Washington, D.C.

DELIVERED TO
INSTALLED AT

3103 Georgia Ave., N. W.

63345 CUSTOMERS ORDER NO. — DATE ORDERED 2/4/64

2	lts.	30 x 56	DSB	Glaze New Sash		
1	lt.	14 x 20	SSB	H & G		
2	lts.	14 x 25	Obscure Wire Glass			
2	lts.	24 x 24	"	" "		
		Reduce Customer's Frame 7"			87	00
				DC Sales Tax	2	61
						89.61

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,736

CLAUDE G. WALKER, *ET AL.*,

Appellants,

v.

EMMETT C. WADE,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ROBERT H. COOKE
600 "T" Street, N. W.
Washington, D. C.

Attorney for Appellee

QUESTIONS PRESENTED

In the opinion of the appellee, in addition to the questions presented by appellants, the questions presented are:

1. Whether one who contracts for alterations and repairs of a building owned by him, and expresses his acceptance and approval of the work of the contractor by affixing his signature to a request by the contractor for final payment, coupled with an architect's certificate of approval is precluded from thereafter raising any objections to the work performed and is such approval conclusive evidence that the work called for under the contract was substantially performed and in a workmanlike manner so as to entitle the contractor to final payment under the contract.

2. Whether appellee having performed certain extra work at the request and with the approval of the appellant is entitled to recover value therefor.

3. Whether the non-procurement of a performance bond by appellee was waived by appellant and if not should appellant be given credit for the cost of the performance bond.

INDEX

CITATIONS

CASES:

STATUTES AND RULES

MISCELLANEOUS:

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* Cases and authorities chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,736

CLAUDE G. WALKER, *ET AL.*,

Appellants,

v.

EMMETT C. WADE,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On August 12, 1963 appellee and appellants entered into a written agreement by the terms of which appellee was to renovate, repair and alter a building owned by appellants located at 3103 Georgia Avenue, N. W., Washington, D. C. (J.A. 103-106). The contract price was $49,995.00 and was to be paid in four equal installments of $12,498.75 (J.A. 104).

Appellants obtained financing with the Industrial Bank of Washington who agreed to disburse the installments, as aforestated, in draws to be approved by an architect selected and approved by the lender and the owner (J.A. 46, 76) and Pltf. Ex. 7 (Supp. J.A. 4).

At the time that appellants sought financing there was extant a deed of trust on the involved property. As a result, the lender when making its first installment included an amount sufficient to pay off the above encumbrance (J.A. 49).

Three installments of $12,498.75 each were paid to appellee respectively after the architect had certified to the bank that the work had progressed to the required point and that the work was satisfactory (J.A. 44, 45, 48) and Pltf. Exs. 6, 10 (Supp. J.A. 2, 15). The work was completed on or before February 17, 1964 and appellee thereupon made his demand for final payment. The architect certified to the bank that the work had been completed and that the final payment was accordingly due. Appellant Claude G. Walker indicated his approval of the final payment by affixing his signature to the request for payment rendered by appellee (Pltf. Exs. 9, 10, Supp. J.A. 7, 15).

Before the bank could disburse the funds appellant husband placed a stop order with the lender alleging that appellee failed to perform the contract in a workmanlike manner and in accordance with the plans and specifications (J.A. 52).

The contract also provided that a performance bond be acquired by appellee (J.A. 99). The evidence indicated however that appellants did not desire one because the cost of the premium would increase the contract price (J.A. 34). The appellants had also used some of the loan to pay off a pre-existing encumbrance (J.A. 49) which had already left a deficit in the final installment to be paid (J.A. 44).

The contract also outlined the procedure for authorizing charges for extra work to be performed (J.A. 100). Appellants also refused to

pay for extra work performed by appellee on the ground that the work had not been authorized by appellants. In this regard appellee testified that the extras were agreed to orally by appellant husband (J.A. 35). Likewise appellant husband testified that he could not afford two architects and thus accepted an architect selected by the lender (J.A. 75). Appellant husband also testified that he kept in contact with "his" architect by telephone in respect to anything which in the opinion of appellant was out of order (J.A. 76). There was also evidence that oral authorization to effectuate changes in the work was given to appellee by appellant husband who was present on the premises at all times and "his" architect.

On March 9, 1964 appellee filed a notice of intention to hold a mechanics lien, and on May 19, 1964 appellee filed a complaint against appellants to enforce a mechanics lien (J.A. 1).

On July 13, 1965 the trial Court rendered judgment in favor of appellee in the amount of $17,411.78 with interest from March 9, 1964 (J.A. 12).

STATUTES INVOLVED

Title 38, District of Columbia Code, Section 101, 1961 Edition.

Mechanic's Liens:

"Every building erected, improved, added to, or repaired by the owner or his agent, and the lot of ground on which the same is erected, being all the ground used or intended to be used in connection therewith, or necessary to the use and enjoyment thereof, to the extent of the right, title, and interest, at that time existing, of such owner, whether owner in fee or of a less estate, or lessee for a term of years, or vendee in possession under a contract of sale, shall be subject to a lien in favor of the contractor with such owner or his duly authorized agent for the contract price agreed upon

between them, or in the absence of an express contract, for the reasonable value of the work and materials furnished for and about the erection, construction, improvement, or repair of or addition to such building, or the placing of any engine, machinery or other thing therein or in connection therewith so as to become a fixture, though capable of being detached. Provided, That the person claiming the lien shall file the notice herein prescribed. (March 4, 1901, 31 Stat. 1384, Ch. 854, Sec. 1237)."

Title 38, District of Columbia Code, Section 102, 1961 Edition.

Notice:

"Any such contractor wishing to avail himself of the provision aforesaid, whether his claim be due or not, shall file in the office of the Clerk of the United States District Court for the District of Columbia during the construction or within three months after the completion of such building, improvement, repairs, or addition, or the placing therein or in connection therewith of any engine, machinery, or other thing so as to become a fixture, a notice of his intention to hold a lien on the property hereby declared liable to such lien for the amount due or to become due to him, specifically setting forth the amount claimed, the name of the party against whose interest a lien is claimed, and a description of the property to be charged, and the said clerk shall file said notice and record the same in a book to be kept for the purpose. (Mar. 3, 1901, 31 Stat. 1384, ch. 854, Sec. 1238; June 25, 1936, 49 Stat. 1921, ch. 804; June 25, 1948, 62 Stat. 991, ch. 646, Sec. 32(b); May 24, 1949, 63 Stat. 107, ch. 139, Sec. 127)."

Title 38, District of Columbia Code, Section 111, 1961 Edition.

Decree of Sale:

"If the right of the complainant, or any of the parties to the suit, to the lien herein provided for shall be established, the Court shall decree a sale of the land and premises of the estate and interest therein of the person who, as owner, contracted for the erection, repair, improvement of, or addition to the building, as aforesaid. (Mar. 3, 1901, 31 Stat. 1386, Ch. 854, Sec. 1247)."

Rule 52(a) F.R.C.P.

"(a) In all actions tried upon the facts without a Jury or with an advisory Jury, the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial Court to judge the credibility of the witnesses...."

SUMMARY OF ARGUMENT

In the instant case the findings of the trial Court should not be set aside because appellee proved his case by a clear preponderance of the evidence.

The trial Court, sitting without a Jury, had ample opportunity to judge the credibility of the witnesses and to draw a reasonable conclusion from the evidence. The conclusion(s) drawn were in favor of appellee.

The evidence adduced by appellee unequivocally showed that the work pursuant to the contract was fully performed, except for changes and deviations requested by the owner. In any event there was substantial performance of the contract.

The evidence is uncontroverted that appellants approved each installment payment released to appellee, including the last. It is also uncontroverted that an architect hired by the lender and approved by appellants also approved each installment when due. The approvals as aforestated were made by appellants in conjunction with the fact that appellant Claude G. Walker maintained an office in the involved building during the entire time of construction.

It is submitted that any deficiencies that may have existed prior to final approval were known or should have been known to appellant.

If the contention of full performance is not tenable, appellee contends that there was substantial performance, and any deficiencies were minor in nature.

The appellee performed extra work at the request and with the approval of appellants. The record clearly shows that appellant Claude G. Walker expressly requested and authorized certain "extras."

Although appellant Claude G. Walker denied giving permission to appellee for certain extras, this denial falls short in view of the documentary evidence to the effect that appellant Claude G. Walker would pay for "extras" by way of a deed of trust. Translated into legal language, appellants waived the contract requirement of prior written authorization as regards to "extras."

Appellee also contends that the non-procurement of a performance bond was waived by appellants in juxtaposition with the fact that appellant did not follow the contract provisions as to the procurement of the performance bond.

ARGUMENT

I.

Appellee Established by a Preponderance of the Evidence That There Was Substantial Performance of the Contract and That the Work Was Performed in a Workmanlike Manner Entitling Appellee to Final Payment Under the Contract.

Rule 52(a) of the Federal Rules of Civil Procedure is applicable to the instant case. The rule prescribes that findings of fact in actions tried without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Thus has evolved the rule of law that a trial judge's fact findings must not be set aside by the appellate court unless clearly erroneous. *Consolidated Realty Corporation v. Dunlop*, 72 App. D.C. 273, 114 F.2d 16 (1940); *United States v. Gypsum Co.*, 68 S. Ct. 525, 333 U.S. 364, 92 L. Ed. 746 (1947).

In the instant case there was conflicting evidence as a result of the proof adduced between both sides on all controverted points in regards to performance.

The appellee testified that the work was fully performed, according to plans and specifications, except for changes and deviations requested by the owner. There was further testimony that appellee had received three previous installments of $12,498.75 each, and each time the installments were paid without objection. (J.A. 17, 18). Likewise, before each installment was paid the work was inspected by an architect proffered by the lending institution and approved by appellants. (J.A. 45, 46, 55, 56, 76)

Appellant on the other hand testified in essence that on February 18, 1964 (the day after request for final payment was signed by appellant) he observed a number of conditions in the building which needed correction. (J.A. 62-67) It should be worthy of note at this juncture to

point out that as the appellant Walker maintained his office in the involved building during the entire time of construction, it is plausible to presume that appellant Walker was aware or should have been aware of the needed corrections prior to affixing his signature to the request for payment submitted by appellee. (J.A. 81, 82)

It is submitted that the evidence established that any deficiencies which may have existed prior to approval by appellant Walker were minor in nature. In *Nicholas T. Haller v. Nathan B. Clark*, 21 Dist. of Columbia Reports 128 (1892), the court held in a factual situation similar to the instant case: If in a suit to enforce a mechanics' lien it appears that certain parts of the contractor's work were accepted by the defendant after they were completed, such acceptance implies that the work is to be paid for, and it is too late to renew objections that had thus been waived, after suit is brought.

The gravamen of the entire controversy is whether or not there was substantial performance pursuant to the contract. The evidence is almost overwhelming in the affirmative. In *Williston on Contracts*, Third Edition, Vol. 6, Sec. 842, it is stated thusly:

> ". . . A plaintiff who has substantially performed is entitled to recover, although he has failed in some particular to comply with his agreement."

In any event where two different conclusions may reasonably be drawn from uncontroverted evidence, question as to which should be drawn is for trial court. *United States v. Ingalls*, 72 App. D.C. 383, 114 F.2d 839 (1940).

It is well established that where there is substantial performance of a building contract, even though attended by minor short comings, the contract price may be recovered, less a fair allowance to the owner to make good the defects.

The doctrine of substantial performance is recognized in the Dis-

trict of Columbia and a contractor is entitled to recover the contract price less compensatory damages for any injuries found to be due to defective or incomplete work. *Turner v. Henning*, 49 App. D.C. 183, 262 F. 637 (1920); *Matthew A. Welch & Sons, Inc. v. Bird*, 193 A.2d 736 (D.C.A. 1963). In the instant case the evidence clearly shows that the deficiencies, if any, were trivial. Likewise the trial court denied compensation to appellants for any alleged deficiencies.

II.

The Trial Court Did Not Err in Finding That Appellee Performed Extra Work at the Request and With the Approval of Appellants

During the entire time appellee was performing the work on the premises in question appellant Claude G. Walker continued the practice of his profession on the same premises and was present at all times and observed all aspects of the work including deviations and extras.

Certainly, by reason of the fact said appellant Claude G. Walker was always on the premises and observing the work done there is a strong presumption that he and appellee discussed all deviations, if any, and all extras to have been performed by appellee, prior to the time same was performed, and that the appellant Claude G. Walker requested and approved same before performance by appellee.

That by way of substantiation of the presumption that appellant Claude G. Walker requested and authorized the deviations, if any, and extras involved herein, note the testimony of said appellant in the trial Court which clearly shows that he did authorize appellee to obtain a completion bond which is an extra (J.A. 71). By way of further substantiation of this presumption, note the testimony of said appellant with respect to substitute glass used on the premises, which he acknowledges he discussed with appellee and interceded for and selected (J.A. 79, 80, 78).

The use of the substitute glass in question necessitated additional costs in that the appellee was required to furnish additional labor and materials in order to install the glass, whereas had the Hines Turner glass, originally ordered, been used same would have been installed by Hines Turner without costs beyond the original contract price (J.A. 38, 39).

The Hines Turner glass was originally requested by appellant Claude G. Walker and ordered by appellee (J.A. 37). It was not the fault of appellee that the glass from Hines Turner could not be delivered on time. Had appellee been free to obtain the desired glass from any source he chose and not bound by the requests of appellant Claude G. Walker that the glass be obtained from Hines Turner Company, no substitute would have been necessary and no extra charge would have been made.

By reason of the extra labor and material in installation of the substitute glass appellee sustained and incurred additional costs and expenses (J.A. 37, 38, 39, 40) (Pltf. Ex. 5, Supp. J.A. 1) (Def. Exs. 2, 3, 4, 5, Supp. J.A. 16-27).

In further substantiation of appellee's presumption that appellant Claude G. Walker discussed, requested and authorized the extra work and services it will be noteworthy to observe that there must have been a meeting of the minds of both parties and an understanding that said extras would be paid for by appellant Claude G. Walker by execution of a note secured by a deed of trust on the premises, to the appellee (J.A. 107).

> "Where parties have agreed that an engineering fee should have a ceiling and no additional compensation for extras are payable except by written agreement in advance, such agreement controls but parties may waive compliance with requirement that there be a written agreement governing extras." *Alden v. Central Power Electric Co. Co-op,* 168 Fed. Supp. 19.

"Even though a written contract stipulates that it may not be varied except by an agreement in writing, nevertheless the parties, by a subsequent oral agreement, may modify it by mutual consent." *Freeman Et Al v. Stanbern Const. Co.*, Court of Appeals of Md. 1954 Case.

"Building Contract provision that no alterations should be made except upon written order of architects and provision that no alterations for which affected price or time for completion should be made without written order from owners did not prevent parties from subsequently making another and different agreement and from orally modifying written contract, when they mutually agreed thereon." *Sitkin v. Smith*, 276 P. 521, 35 Ariz. 226, 66 ALR 645.

". . . Where, however, alterations made in the work are of such a character that the owner should from their nature be aware that they will be attended with extra cost it is not necessary that the builder notify the owner that extra compensation will be expected. . ." 17A, C.J.S. Sec. 371 (4), page 407, 1963 Ed.

III.

The Trial Court Did Not Err in Refusing To Give Appellants Credit for the Non-procurement of a Performance Bond by Appellee.

From the tenor of appellee's brief on the above point it would appear that appellee contracted with appellants to pay to the latter a definite sum of money or to render performance the value of which is ascertainable by mathematical computation. Likewise, appellants contend that a breach of the above necessitates money damages.

Appellee contends that there were to be no emoluments accruing to appellants by procurement of the performance bond and conversely,

by the non-procurement thereof, appellants are not entitled to a credit for the cost of the premium.

The main thrust of appellee's argument on this point is, that there was unequivocal testimony from appellee to the effect that a performance bond was not obtained by consent of both parties. The reason given was there would be an increase in the price of the job and appellant Walker could not afford it. (J.A. 34, 35) It is worthy of note that nowhere in the evidence, testimony or documentary, is there anything which rebuts the testimony of appellee as to why the performance bond was not procured.

In article 30 of the specifications it is stated (J.A. 102):

> "The owner shall have the right, prior to the signing of the Contract, to require the Contractor to furnish bond covering the faithful performance of the Contract and the payment of all obligations arising thereunder, in such form as the owner may prescribe and with such sureties as he may approve. If such bond is required by instructions given previous to the submission of bids the premium shall be paid by the contractor; if subsequent thereto, it shall be paid by the owner." (Emphasis added.)

It is submitted that nowhere in the testimony does it show that the above procedure was followed.

CONCLUSION

For the foregoing reasons appellee submits that the judgment of $17,411.78 in favor of appellee Emmett C. Wade should be affirmed.

Respectfully submitted,

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